United States Court of Appeals
for the Second Circuit

APPENDIX

76-7292, 7391, 7449, 7450,
76-7466, 7485, 7506

B
P/s

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GEORGE ARTHUR, *et al.*, *Plaintiffs-Appellees,*

vs.

EWALD P. NYQUIST, *et al.*, *Defendants-Appellants.*

Complete title of all parties printed on inside of cover.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

JOINT APPENDIX
VOLUME II — Pages 593-1329

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH,

Plaintiffs-Appellees,

vs.

EWALD P. NYQUIST, individually and as Commissioner of Education of the State of New York, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THOMAS M. BLACK, CARL H. PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK, HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUISE E. YAVNER, MARTIN C. BARELL and LAURA BRADLEY CHODOS, individually and as Members of the Board of Regents of the State of New York, JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo, EUGENE T. REVILLE, individually and as Superintendent of Schools of the City of Buffalo, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN, JOSEPH D. HILLERY and MARILYN P. KAVANAGH, individually and as Members of the Board of Education of the City of Buffalo, STANLEY M. MAKOWSKI, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO,

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ANTHONY J. GIRARD (1234 Delaware Avenue, Buffalo, New York), a witness called by and in behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. GRIFFIN:

Q. Mr. Girard, you are employed by the Defendant Board of Education, is that correct?

A. That is correct.

Q. For how long have you been employed by the Board of Education?

A. Since 1949. I started as a substitute teacher approximately twenty-five years.

Q. And during a certain period of that time have you been the Director of Pupil Placement and Pupil Personnel Services for the Board of Education in the City Hall?

A. That isn't exactly my title. My title is Director of School Attendance Services, and I am part of the Pupil Personnel Department. I am not in charge of all the pupil transfers or placements. My title is Director of School Attendance Services.

Q. But you have been involved for a number of years, have you not, with the matter of school attendance and school transfers?

A. Yes, for approximately ten years.

THE COURT: Excuse me, Mr. Griffin. Would you be called in the olden days, Mr. Girard, the truant officer?

THE WITNESS: That is correct, your Honor. When I started as an attendance supervisor, that was a new title, attendance officer, for the old type truant officer. When I started in this position I was the Director of Compulsory Education but we didn't want to have a punitive tone to it so we changed the title to Director of School Attendance Services.

BY MR. GRIFFIN:

Q. Mr. Girard, you have testified at length at a pretrial deposition that was conducted on June 14th of this year and at that time produced many records including individual action on transfer requests, is that true?

A. That's correct.

Q. And you have also under subpoena today produced two

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additional records relative to two transfers that were denied which we have marked as Exhibit 279, is that correct?

A. That's correct. These are the two that were requested by subpoena.

Q. Now, cutting through matters, you were familiar with the use of the language transfer by students residing in the East High School District as a means to not attend East High School, is that correct?

A. Well, we never really looked at it in that terminology.

Q. Well --

A. The policy has been if a youngster wants a particular language that is not offered in the school in their district, then we would consider sending them to a school that has the language.

Q. There is a policy, an express policy of the Board of Education that if a number of students in a given high school district want a particular language, it will be offered at the high school where they reside, isn't that true?

A. That is usually the case, yes.

Q. And that is the policy, isn't that right?

A. Yes. If they have a sufficient number and I believe the minimum number would be fifteen to comprise a class, I think they would look into that factor and formulate a particular language program at that school.

(Plaintiff's Exhibit Number 279 marked for identification.)

BY MR. GRIFFIN:

Q. I direct the attention of the Court and the witness to Paragraph 46 of the stipulation wherein it provides "That it has been the policy of the Board of Education to offer languages in each high school if there are a sufficient number of students who express a bona fide interest in taking such language", correct?

A. That is correct.

Q. And you said fifteen would be a sufficient number to be a bona fide number to offer the course, is that right?

A. I would say at least a minimum of fifteen.

Q. Now, you know that from 1960 through at least July of 1972 Polish was not offered at East High School, is that correct?

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A. You say from 1960 to 1972?

Q. Right, Polish was not offered in East High School?

A. I believe you are correct because it was offered prior to 1960, yes.

Q. Please, my question. You also know --

A. Yes.

Q. -- that there were many multiples of fifteen students who resided in the East High School District who wanted to take Polish, isn't that right?

A. Yes.

Q. But the Board ignored and went against its express policy of granting language classes, namely Polish, in the East High School District at least from 1960 through '72, is that correct?

A. Well, again, I don't know whether the Board was at fault for doing that. I think it was --

Q. I don't want you to say who was at fault.

A. In regards to the number of requests for the language.

MR. PAMFIL: Your Honor, may I object to the leading questions? I think it is taking a lot of time and I object.

THE COURT: I don't know whether it is leading, but I don't know whether

Mr. Girard was familiar with the language presentation in the years. Mr. Girard, were you in the years 1960 to '72?

THE WITNESS: No, your Honor. I didn't, - my position came into effect in July of 1965 and I really didn't get involved in transfers until probably 1966 and '67.

THE COURT: I see.

BY MR. GRIFFIN:

Q. Well, let me establish this; isn't it a fact, Mr. Girard, that year after year many, many students would line up in the halls outside your office from the East High School area seeking language transfers to South Park?

A. I can't deny that. There were quite a few students that were outside my office, yes.

Q. And as a matter of fact, at your deposition didn't you say that it was almost a situation that you would have to issue supermarket numbering tickets to keep it straight, there were so many?

A. That's right. I think we did that for a few years.

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Q. Now, isn't it also a fact that year after year you brought to the attention of Superintendent Manch this fact and requested that Polish be offered at East High School?

A. Well, your Honor, I really don't recall bringing it directly to Dr. Manch's attention. I think our department expressed --

THE COURT: Did you call it to the attention of --

THE WITNESS: Of our superior, the Associate Superintendent, that we were having a great many requests for transfers.

THE COURT: To whom did you call this to the attention of?

THE WITNESS: I believe our superior at that time was Dr. Norman Mayes and Mr. Lance and now it is Mr. Revelle.

THE COURT: What did you tell Mr. Mayes, Mr. Lance or Mr. Revelle about these applications that you were receiving?

THE WITNESS: We expressed --

THE COURT: Not "we".

THE WITNESS: Well, I am not the only one.

There are two Directors of Pupil Personnel and there are two supervisors and myself that process transfers, so there is five of us plus the assistant superintendent, so there is actually six people involved.

THE COURT: All right.

THE WITNESS: And we expressed to our superior, which would be the Associate Superintendent for Instructional Services, the fact that we were overwhelmed the first few weeks of school and we couldn't do our regular work we were so involved in these transfer requests.

BY MR. GRIFFIN:

Q. Mr. Girard, didn't you testify starting at Page 17, Line 15, that you constantly brought this to the attention of the superintendent, a person that you had known over twenty years?

MR. [illegible]FIL: May it please the Court, if it is in a prior deposition, it speaks for itself.

THE COURT: All right. Do you want to read that? In this case, Mr. Girard is a managing agent of one of the defendants here so just read that portion in, Mr. Griffin, and you listen, Mr. Girard.

BY MR. GRIFFIN:

Q. Mr. Girard, I would like to read your testimony starting at Page 17 with the question at Line 10 and ask you whether you were asked these questions and you gave these answers, your sworn testimony on June 14, 1974.

"Q. I am talking prior to July of 1972 while these transfers were committed. Did you at anytime recommend to the Superintendent or to the Board of Education or to anyone that the languages that these students were asking to take be offered at East High School?

A. Yes, I did. In fact, we constantly did, Mr. Griffin. Because we felt that the last two weeks of August we get maybe two or three hundred people down here in one day and they were behind up here some days, and it was getting to be, - we're trying to organize for the coming year, and here we're involved in transfers, and we have other work to do here. So constantly we brought to the Superintendent's attention maybe these languages should all be put into East High School. Q. When would you recall that you first made that recommendation? A. Probably every year. Probably every year. Q. Every year. Would that be every year from 1965 when you assumed your position? A. Probably. Probably, yes. Q. And in what form would the recommendation take? A. Mostly verbal. Q. An oral recommendation? A. Yes.

Q. And it would be communicated to the Superintendent? A. Yes. Q. And exactly what, to the best of your recollection, in each one of those years would you have explained to the Superintendent? A. I've known him personally for over twenty years because he used to work in this office. Q. Tell us basically what you said to him each year? A. He knew our position, and when I would run into him there would always be a mention of a number of parents and kids waiting in the halls here. It got to the point maybe give them tickets like a supermarket, there was always so many, and I mentioned to him it would be nice if all the schools could offer all the languages, you know." Was that your testimony at that time, and did I correctly read it?

A. Yes, that was my testimony.

Q. Now, Mr. Girard, a student is entitled to a bus pass and to have subsidized transportation within the City of Buffalo if he travels how far, - he or she travels how far to attend school?

A. Well, in order to be eligible for a bus pass the criteria is you have to live at least one and a half miles from the school, a mile and a half.

Q. Now, is it a fact that South Park High School is located more than one and a half miles from the East High School District?

A. Yes.

Q. All right. Therefore, any person who would attend South Park High School from the East High School District would be subsidized and bused to South Park High School, is that correct?

A. Well, what you mean, Mr. Griffin, in regard to subsidizing, he was given a bus pass?

Q. Bus pass so that the bus transportation would be paid for by the City of Buffalo and the State of New York, is that correct?

A. Not in all cases. There are other means of transportation like some of the students may drive their own car, you see, and so we wouldn't be responsible for these type of students.

Q. But they would be entitled as a matter of right?

A. They would be entitled if it is at least a mile and a half, yes.

Q. To a bus pass?

A. Yes.

Q. And therefore, it is true, is it not, that the City of Buffalo has been providing bus transportation for the students of the East High School District to attend South Park High School under these language transfers, is that correct?

A. That's correct.

Q. And so that if students have used this as a, - students and parents, - as a means of not going to a school with a number of blacks the City has in effect subsidized and provided, - strike "subsidized", - provided transportation to escape an integrated experience, is that true?

MR. GREGORY: I am going to object to the form of the question.

THE COURT: I will sustain.

MR. GRIFFIN: I will withdraw the question. Perhaps it is better.

THE COURT: Did some of the students also go to Kensington?

THE WITNESS: Yes, sir. Polish was offered not only at South Park High School. but also at Kensington High School.

THE COURT: I see.

BY MR. GRIFFIN:

Q. Now, Mr. Girard, what is the criteria, if any, that was established by the Board, and when I say "the Board", I mean your office and those who handled the affairs of the school on a day-to-day basis; what were the criteria or standards that would apply before a language transfer such as one of these transfers to take Polish would be granted?

A. Well, Mr. Griffin, the criteria we tried to establish is based on the students ability if he has passing grades and we feel that in most cases, say, from the East High School District, they are of Polish background and if their parents wanted them to pursue the language of Polish, it would certainly have to be considered as a criteria and plus the fact that they are able to do the particular work that is required in that particular subject.

Q. So all you would require was a passing grade, is that correct?

A. In most cases, yes.

Q. And in some instances of white students you even permitted them to transfer to take Polish where their grades in grammar school were even below passing, is that true?

A. Yes. It depended again, as I say, on their background. Some of them were from Polish families and some of them just came from Poland, you see, and we didn't want to deny them the right of taking the language of Polish besides learning the English language.

Q. Now, Mr. Girard, we have had a number of your transfer approval slips marked as Exhibit 51 and without naming names or specific addresses, I direct your attention to two students who received permission to take Polish and therefore transfer to South Park who were white students and who were about to enter high school after coming from one of the East, - that is, east of

Buffalo parochial schools, is that correct?

A. That is correct. The parochial school is St. Stanislaus, which is a Polish school.

Q. Now, in this instance, the transfers were approved, were they not?

A. Yes, I would say they were authorized, yes.

Q. Now, in the case of one, and please, - I am just wanting to establish marks, - this particular student who was a fifteen year old student who was just coming out of grade, - or applying to go to South Park, had marks of English 60, Spelling 60, Arithmetic 61, Science 60 and Geography History of 60, is that correct?

A. That's correct, yes.

Q. Now, the next person who was permitted to go to South Park under the language transfer, their final marks at this grammar school was English 60, Spelling 75, Arithmetic 60, Sciene 67 and Geography 60, correct?

A. That's correct.

Q. Now I direct your attention to an application also within Exhibit 51 to transfer to Bennett High School to take Hebrew. That was a language that was not offered at East High School, correct?

A. That is correct.

Q. And that was offered at Bennett, right?

A. Correct, yes.

Q. And that particular person wanted to go to Bennett and take Hebrew at Bennett, is that correct?

A. That's correct.

Q. That particular person happened to be black, is that right?

A. Yes.

Q. What was the average that that person had?

A. 75 average.

Q. And the transfer was denied, is that correct?

A. That is correct.

Q. Now, I direct your attention to Exhibit 279 which contains two applications for transfer which involved two additional black students, and that is in Exhibit 279, is that correct?

A. That's correct.

Q. Now, the first student, again, this is out of the East High School District, - no, correction. This was a language transfer where the person resided in the Woodlawn district, right, and wanted to take Russian, is that correct?

A. Woodlawn and Lafayette High School District.

Q. But they wanted to go to Bennett High School and be able to take Russian at Bennett, is that correct?

A. That's correct.

Q. This was a black student, right?

A. That's correct, yes.

Q. What was the average that this student had?

A. 87 average.

Q. An 87 average?

A. Yes.

Q. Was the transfer denied?

A. Yes, it was denied. I can explain to you why.

Q. It states on the record "Need 90 term average", is that correct?

A. That's correct.

Q. Is that the reason?

A. Yes. Would you like me to explain this to you?

Q. No. If any other questions are going to be asked, somebody else will ask them.

MR. GREGORY: No. Objection. This wasn't the rule made by the Court yesterday. I object to his limiting the witness.

THE COURT: Wait a minute. I will run the rules here, Mr. Gregory. You may, if you do not like them, you may object from time to time but I do not think that is a proper objection. You may bring out the reason if you desire. I believe I will anyway. Go ahead.

BY MR. GRIFFIN:

Q. Now, within Exhibit 279, Mr. Girard, there is another application for a black student who lived in the East High School District, is that correct?

A. That's correct.

Q. And this person wanted to go to Bennett High School to take academic courses that were not offered at East?

A. That is correct. This person asked for academic program that East High School did not offer and the only academic program was the Hebrew, you see. They have a similar program except for the Hebrew.

Q. You don't restrict the taking of Hebrew to people of Jewish backgrounds, do you?

A. Well, if you let me explain to you, I think I can clear this matter up.

THE COURT: Why not let Mr. --

BY MR. GRIFFIN:

Q. Before the explanation, let's just complete this particular person who is the second one. Now, this person was denied a transfer, is that right?

A. That's correct.

Q. And had an 82 to 83 per cent average?

A. That's correct, yes. I called Mr. Sicora, the principal on this. The memorandum and my writing here indicates Mr. Sicora was contacted and the parent was told that the son had to have at least a 90 average to be considered for Bennett High School. But, Mr. Griffin, as brought out, those three cases where children were denied the right to go to Bennett High School, in Bennett High School has an honors program in Hebrew and Russian which the other schools do not offer, your Honor, and I checked into this more thoroughly because I knew for years that they had this honors program and I often wondered why a 90 average has a criterion so I got this report from both the principal and the guidance counselors. The following criterion has been established at Bennett High School, so to present to the student the highest caliber of instruction. One, any student that is considering this program --

Q. What are you reading from now?

A. This is a notation from my attendance teacher to me explaining the program.

Q. This was something you secured after your deposition?

A. Yes.

Q. But at your deposition, Mr. Girard, you testified that in order to have a language transfer you had to have a passing average?

A. That's correct, but I didn't indicate anything about an honors program.

THE COURT: Wait a minute. This is dated October 1974.

THE WITNESS: Yes.

THE COURT: We are going back here to a few years ago. Put that aside for a minute, Mr. Girard.

THE WITNESS: All right.

THE COURT: Go ahead, Mr. Griffin. I think you should, and any witness should try to answer the question asked and then if there is anything further that ought to be brought out which is material here, the best way to proceed is to have your counsel, Mr. Gregory, bring it out.

BY MR. GRIFFIN:

Q. But in the case of the two that had averages well below passing who wanted to take Polish out of East High School District, that was granted to South Park, is that correct?

A. Yes, but there is a difference in programs, Mr. Griffin.

THE COURT: Mr. Girard, I think that we are not going to argue here that a person with a 60 average can take Polish and you need 90 to take Russian. As far as I am concerned, they would all be, it seems to me, be difficult languages, but at any rate, why not listen to the question?

BY MR. GRIFFIN:

Q. Now, you participated, Mr. Girard, in the investigation into a number of students who should have gone to School 16 going to School 30 and 38, is that correct?

A. That's correct.

Q. Now, do you remember, and you did that sometime during the HEW investigation, is that right?

A. That is correct, yes.

Q. And that investigation kind of prodded that looking into the situation, is that right?

A. That's correct.

Q. Of course, it was a situation that was known by persons downtown, so to speak, for years, isn't that true?

MR. GREGORY: Excuse me. I am going to object to counsel testifying. If he has a question to place to the witness, let him place the question but we don't need his testimony.

THE COURT: Mr. Griffin, try not to ask leading questions. Go ahead, Mr. Griffin.

BY MR. GRIFFIN:

Q. Mr. Girard, upon your deposition we questioned you, - strike that. Let me start this way. There is a street in the School 16 District known as Oakland Place, is that correct?

A. That's correct.

Q. And upon your, - and so that any grammar school, elementary school children who reside on Oakland would be required to attend School 16, is that right?

A. That's right.

Q. And do you recall my questioning you relative to a particular family on Oakland that had two or three children who were granted permission to go to some school outside of the School 16 District?

A. Yes, I recall.

Q. And without discussing the particular family or name, did you not advise at that time that because this was an affluent street then in effect the School Department would not expect this particular family to send their children to School 16?

A. I don't know whether my words were exactly that way, but I think I might have said something to the effect that anyone on Oakland Place could probably afford to send their children to either a parochial or a private school.

Q. That isn't at issue because the particular parents chose public education in this instance, correct?

A. I don't really recall.

Q. Well, let's look at the instance.

THE COURT: Mr. Girard, may I see those exhibits, please?

THE WITNESS: These here?

THE COURT: Yes, and maybe the other two.

BY MR. GRIFFIN:

Q. Starting at Page 65 of your testimony, - correction, - yes, starting at Page 65 and I will ask you whether you were asked these questions and you gave these answers. We now move to discussing three children of the ages 7, 8 and 9 who resided on Oakland, is that correct?

A. Yes.

Q. And at the particular time of the transfer request they were seeking a transfer from School 30 to School 45, is that correct?

A. It is difficult for me to tell by your notes here. I would have to look at the transfer request, which I am familiar with, you see.

Q. All right.

THE COURT: Do I have that here?

MR. GRIFFIN: If I could just select that out of the particular exhibit, your

Honor.

THE COURT: Right.

THE WITNESS: Yes. This authorization was made to the principal of School 45.

BY MR. GRIFFIN:

Q. Now, at the time the particular subject of the transfer were three elementary students who resided on Oakland in the School 16 District, is that correct?

A. That's correct, lived on Oakland Place.

Q. And at the particular time that this transfer was granted, they are applying to go from 30 School to 45 School, right?

A. Yes. At the particular time this request was made.

Q. And the request was granted, right?

A. Yes.

Q. So there was a transfer approved out of the district of 45 and previously in order to get into School 30 there had to have been a previous transfer request apparently approved, is that correct?

A. I would assume, yes.

Q. So in two instances, this particular family from Oakland, was granted permission to go to Schools outside of the district in which they resided, is that right?

A. Yes.

Q. All right. Now, down to the basis in your testimony relative to the reasons. Turning to Page 67 the listed reason for granting this transfer was, quote, "Social adjustment", is that correct?

A. That's correct, yes.

Q. Now, were you asked this series of questions and did you give these answers, starting at Page 67, Line 13, "Q. What was the social adjustment that was involved in permitting them to go to a school, - what was the social adjustment as of 1969 when they applied for this transfer, what was the social adjustment that permitted them to go to a school other than School 16 where they were supposed to go? A. Well, again, - can it be off the record? Q. No. I want this answered on the record. A. Well, if you want an honest opinion -- Q. Yes, I want everything to be honest. A. Here we have a family I would assume that it's pretty, it's pretty well, - a pretty well affluent family, they live on Oakland Place, and it's one of the nicest streets in the City of Buffalo. Q. Right. Seymour Knox and the Bishop of Buffalo lives there, as well as others. A. They have children at 30, and they live in School 16 District, and I think they just felt the children would perform better in an all white school in preference to an all black school. Q. Certainly the fact that they are wealthy had nothing to do with the decision, did it? A. No. I'm just going by the facts that I have. Oakland Place is a nice street and they probably weren't going to send their children to 16 School, you know. Q. Then your best inference of the thing is that the principle reason that four white children did not want to go to School 16 but wanted to go to School 45 was because of the racial composition of 45 as opposed to 16? A. It could be. If they felt that they are making a better adjustment at School 30 or School 45, they felt that maybe their children wouldn't adjust as well at School 16.", is that correct?

A. That's --

Q. That was your testimony at that time?

A. Yes.

Q. Now, with respect to School 54, School 54 is a school that has become progressively worse over the past few years in terms of its racial balance, is that not correct?

A. Yes.

Q. As a matter of fact, you recall, Mr. Girard, that when the Superintendent of Schools and the Buffalo Board was asked by the Commissioner of Education to show some progress in achieving integration that they pointed to School 54 as of a report rendered in the middle of '69 or the middle of '70 as a place that was an integrated school?

A. Yes, at that particular time.

Q. Now, the northerly-most boundary of School 4 is Morris Avenue, is that correct?

A. That's correct, yes.

Q. Now, is it not a fact that as of the time of your deposition that there were either four or six students from Morris Avenue who should have attended School 54 who were permitted to attend School 22, a school farther to the north in a white neighborhood?

A. You are probably correct, Mr. Griffin, on that but again there are different circumstances and reasons for that. There may have been some older children at School 22 and there is some hardship involved. Maybe the parent wanted the older children to supervise the younger children. You see, every case is an individual case, and there are different reasons for every case.

Q. Yes, but the policy of the Board and the rule is that every school, - strike that, - every child is required to go to the school --

A. In their district.

Q. In the district. Now, if you say it is a hardship --

MR. GREGORY: I object to that. I don't think that is a correct statement Mr. Griffin has just made and he knows it isn't.

BY MR. GRIFFIN:

Q. Well, with the exception of hardship, right?

MR. GREGORY: Of transfers.

THE WITNESS: No, hardship isn't the only reason. There are other reasons. I have at least five or six other reasons.

BY MR. GRIFFIN:

Q. Other reasons have been followed by the Board in the implementation of that policy, correct?

A. Our policy is where the welfare of the student is concerned. This is our pupil personnel policy.

Q. But you mention now that perhaps a reason is that younger children are permitted to go, - strike that, - that children might be permitted a transfer to another school if they had brothers or sisters attending the other school, right?

A. Yes, absolutely, especially if the parents are working and they want the older children to supervise them during the day, yes.

Q. But in the first instance the brothers or sisters who started out in the school, they also were granted an exception to the transfer policy?

MR. GREGORY: I object to that. That is not necessarily so. They could have moved.

THE COURT: You do not know and if it is not so, Mr. Girard will tell us.

MR. GREGORY: We are talking about nobody. How can Mr. Girard know?

THE COURT: Will you let Mr. Girard testify, Mr. Gregory?

MR. GREGORY: Your Honor, I am offering an objection and I want to state the purpose of my objection.

THE COURT: All right. I will hear your

objection. I want to hear the witness.

MR. GREGORY: I haven't --

THE COURT: Sit down, Mr. Gregory.

MR. GREGORY: -- offered my objection.

THE COURT: You have. You objected. I will hear your argument later. I will hear the answer now. Please sit down, Mr. Gregory. Mr. Griffin, please try to ask questions which are not leading. If you want to read any of this testimony, it may be read. Mr. Gregory, please, you do not have to raise your voice here. There is nobody to impress. There is no jury. Let us take this one step at a time.

MR. GREGORY: If your Honor please, I am not trying to impress anybody.

THE COURT: Please do not raise your voice. It is not required.

MR. SEDITA: Your Honor, may I ask for the record, are you sustaining Mr.

Gregory's objection.

THE COURT: No. I overruled it.

MR. SEDITA: I thought you admonished Mr. Griffin.

THE COURT: Mr. Griffin, go ahead, ask a different question, please.

MR. GRIFFIN: Yes, sir.

THE COURT: Please do not read. If you want to read any of that material it may all be read.

BY MR. GRIFFIN:

Q. Mr. Girard, I direct your attention to your sworn testimony at deposition.

A. Yes.

Q. Starting at Page, - withdraw that for the moment. If I just may have a moment, your Honor. All right. If I may have these records again, your Honor, I have the particular ones that I want to find out about. I direct your attention to a transfer approval that was made for someone who lived on Crescent Avenue in the District of 54, is that correct?

A. That's correct, yes.

Q. Now, in that particular case the student had been at the local parochial school which was St. Mark's, is that correct?

A. That's correct.

Q. And their residence put them in the School 54 District, right?

MR. PANFIL: May I interrupt. Are you at a particular place in his deposition?

BY MR. GRIFFIN:

Q. Yes. Page 153 close to the bottom, Mr. Panfil, and in that instance a hardship transfer was granted on the ground that there were two older children in Bennett High School, is that right?

A. That's correct.

Q. Now --

THE COURT: And the transfer was to School 22?

THE WITNESS: No, your Honor. In this case they asked for School, - you are correct. The transfer request was for School 22.

THE COURT: I see.

THE WITNESS: And there are two older children attending Bennett High School.

THE COURT: And Bennett on the map so we have the record complete, Bennett is, oh, perhaps three or four blocks from School 22?

THE WITNESS: That is correct, about two blocks. Approximately two blocks on Huntington Avenue.

BY MR. GRIFFIN:

Q. Now, School 54 is closer to the residence of the particular people on Crescent than School 22, isn't that true?

A. No. Crescent runs up.

THE COURT: I suppose it depends on the address.

THE WITNESS: 445 Crescent is up towards Morris Avenue.

BY MR. GRIFFIN:

Q. Correct, - no.

A. Maybe it is two blocks from Morris.

Q. To the south two blocks, in the vicinity of Amherst Street, wouldn't it, Crescent and Amherst?

A. Yes. In this case here, - see, I didn't handle this case. One of the directors of Pupil Personnel handled this case, but I think the reasoning was when the request came in, the two older children attending Bennett can drop the three younger children off at 22 before they went to Bennett. It seemed like a reasonable request on the basis of hardship.

Q. Well, that means, though, that three whites leave School 54, correct, in that case?

A. Unfortunately we lost three whites, yes, at 54.

THE COURT: They wouldn't go to 54 anyway, when you say three, - two were attending Bennett?

THE WITNESS: Two were at Bennett and three were sent to School 22.

THE COURT: Oh, I see, three.

THE WITNESS: A fifth grader, a sixth grader and a second grader.

THE COURT: All right.

BY MR. GRIFFIN:

Q. So we are dealing with a sixth grade student and a fifth grade student and how old was the other one?

A. A second grade student about seven or eight years of age.

Q. Who were required to go to 54?

A. Yes.

Q. But they were able to convince whoever passed on the transfer request that the presence of a Bennett High School student with them, namely an older brother, was a basis for hardship?

A. Two older children were attending Bennett.

Q. And is it your judgment that all five walked to school together?

A. Again, Mr. Griffin, I was not involved in this request and I think one of the questions that the person that was involved would ask is, first of all, in regards to hardship, whether or not the parents were working. If the parents were working, then they would need some help in supervising the children.

Q. Well, let's assume that there are no parents at all in the case. Let's just approach it that way. Do you know whether all five left their schools at the same time, that their class times coincided?

A. No. They would start earlier at Bennett than at 22 School, but we get many children in the elementary schools in our schools before 8:00 o'clock. They are waiting for the teachers and the principals to arrive.

Q. Now, there are many, many cases of children who go to school who don't have any older brother or sister to accompany them to school, isn't that right?

MR. GREGORY: I object. May it please the Court, I am going to object to this line of questioning as argumentative and I think that the questions and answers have been resolved.

THE COURT: We will be in recess in a minute. There is just one question I would like to ask Mr. Girard.

THE WITNESS: Surely.

THE COURT: In this case the five youngsters here living on Crescent, and would any inquiry be made about if there was some concern expressed here about older children accompanying a sixth grader to school whether or not there were some other youngsters in the neighborhood who went to School 54? Would you make any inquiry along those lines?

THE WITNESS: Well, your Honor, again you have to realize our position. We get, -

at a particular time, - this was the first of September, 1971. There might have been many, many parents waiting outside our door.

THE COURT: All right. When you pass on a request such as this, and this is one where I suppose they fall into different categories, as I read through them. Some may be health and I suppose this one was just to have older children along. Did you have any, - was there any policy given to you by the Board or by the Superintendent, any direction as to how to handle these situations? I mean, after all, you do have district lines.

THE WITNESS: Yes.

THE COURT: And as I understand the policy is that unless there are special circumstances the students within the district go to the school in the district.

THE WITNESS: That is correct.

THE COURT: Now you evidently here, and others on your staff, made certain exceptions. My question is at that time did you have some guidelines to use?

THE WITNESS: Yes, your Honor.

THE COURT: Were they in the form of a notice or a letter or something else?

THE WITNESS: No. It is sort of an agreed upon policy. If we had a school social worker in our office the last two weeks in August to refer these cases to for investigation, the school social worker would make a complete investigation, find out where the parents are employed, find out the distance between schools.

THE COURT: Who made the arrangement to have the social worker there?

THE WITNESS: Well, our assistant superintendent for Pupil Personnel.

THE COURT: Would there just be one social worker?

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THE WITNESS: Yes. We usually had one school social worker working the last two weeks in August.

THE COURT: Toward the last couple of weeks in August there would be quite a few of these applications?

THE WITNESS: Yes, quite a few.

THE COURT: All right. They would all be referred to her for investigation?

THE WITNESS: Any of these type of cases, cases that are questionable, particularly from certain areas.

THE COURT: Would she give any report to you?

THE WITNESS: Yes. They make a recommendation.

THE COURT: Is there a report?

THE WITNESS: Not directly to me but to the person that processed the transfer, you see.

THE COURT: Is that set forth or attached to the paper there?

THE WITNESS: No. At this time it was the 1st of September so there was no school social worker involved, you see.

THE COURT: There was no social worker on these?

THE WITNESS: What they do, if the parent appears and presses a hardship, we ask "Are you working", and then we ask for verification of their employment.

THE COURT: Is that on the document? Is it recorded?

THE WITNESS: No, it isn't recorded on this, no.

THE COURT: Who told you that it would make a difference whether someone is working or not working?

THE WITNESS: Well, this would be considered hardship if the parents are working and they had no one to supervise their children. We would classify it as a hardship.

THE COURT: Mr. Girard, did someone there, one of the assistant superintendents or the superintendent tell you that you should consider this as a hardship?

THE WITNESS: It has always been a Pupil Personnel policy to consider these type of cases hardship.

THE COURT: Would it make any difference, the district --

THE WITNESS: No, it wouldn't make any difference. If there is a hardship involved, a bona fide hardship where parents need help with someone supervising their children during the day, it wouldn't make any difference. It could be in East High School's District.

THE COURT: It is not set out in your paper here?

THE WITNESS: No. There is no mention here of the parent actually working. Whether or not the director of Pupil Personnel established that identity and confirmation and then from there determined that the two older children can supervise the three smaller children, this decision was made on the basis of the welfare of the younger children. This is the Pupil Personnel policy.

THE COURT: We will be in recess until tomorrow.

(Recess taken at 4:40 p.m.)

* * * * * * *

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 10:15 A.M.

(Appearances as previously noted.)

(Memorandum marked Plaintiffs' Exhibit 280 for identification.)

ANTHONY J. GIRARD, called as a witness on behalf of the Plaintiffs, and having been previously duly sworn, resumed and testified further as follows:

THE COURT: Mr. Griffin, could you tell me what 280 is, please?

MR. GRIFFIN: Yes, your Honor. It is a Board of Education memorandum from Mr. Girard, of March 10, 1972, and it's a report on children attending Schools 30 and 38 that live outside the district.

DIRECT EXAMINATION BY MR. GRIFFIN (Cont'd.):

Q Mr. Girard, I direct your attention to Exhibit 280, and I will ask you if that is a report that you prepared on March 10th of 1972, concerning the number of children who were attending Schools 30 and 38 who did not reside in the School 30 or 38 district?

A Yes, I prepared this report. There seems to be two changes here that I don't have on my original sheet. It is indicated where you have 8 nonwhite, 2 Indian, 1 Oriental, I don't recall that.

THE COURT: Can you keep your voice up, please?

THE WITNESS: Yes, sir. I have prepared this report to Mr. Revelle, our Associate Superintendent for Sectional Services. There are three changes made on this report which I don't recall writing in in regard to 8 nonwhite students, you have 2 Indian, 1 Oriental, and in the second paragraph, you have 1 white, a Pakistanian student. This information was probably taken off the other report.

BY MR. GRIFFIN:

Q Appreciating that the inked in information was not part of your original report, is it, to the best of your knowledge, accurate information?

A Yes, it is.

Q Now, as of March 10, 1972, you reported there were thirty-four students in School 30 who lived outside of the district, is that right?

A That is correct.

Q Now, twenty-seven of these students, of the thirty-four, came from School 16 District, is that right?

A That's correct.

Q And seven from other districts, is that correct?

A That's correct.

Q Now, of the total thirty-four that you found at that time that were in School 30, twenty-six of them were white, is that correct?

A That is correct.

Q And eight were nonwhite?

A That is correct, with the two exceptions that you made.

Q And in the nonwhite category, there were two Indians and an Oriental?

A That's right.

Q As of the date that you made this report, which I think you told us yesterday was prompted by the HEW investigation, right?

A Yes, that is correct.

MR. PANFIL: Is the witness refreshing his memory from his own notes, or using somebody else's notes?

THE COURT: You are using a copy of the exhibit? He is using a copy of Exhibit 280, is that true?

THE WITNESS: That is correct. It is the same except for the change in the nonwhite category.

MR. PANFIL: Your original exhibit shows white, nonwhite, an Oriental, those categories?

THE WITNESS: My original chart shows that, yes.

MR. PANFIL: I misunderstood.

BY MR. GRIFFIN:

Q So that the first paragraph of this exhibit discusses the fact that there are thirty-four students in School 30 from outside of the School 30 District, right?

A That's correct.

Q Now, then the next school district that was reported on was School 38, right?

A Yes.

Q And is it correct that as of March 10,1972, there were fifteen students attending School 38 - -

A That's correct.

Q - - from the School 16 District?

A Yes.

Q And in this instance of those fifteen students, fourteen were white?

A Yes.

Q And one was nonwhite?

A Yes.

Q He was a Pakistanian, is that correct?

A I believe in my chart I show where he is a Pakistanian, yes.

Q Now, then you checked out further to see where the authorizations came from for the transfers of the thirty-four students at School 30, is that correct?

A. Yes.

Q. And did you find that twenty-two out of the thirty-four received authorization from your Pupil Placement Office, the downtown office, correct?

A. Yes, sir, twenty-two were authorized to attend Public School 30, and according to the report, twelve were accepted without authorization.

Q. Twelve out of thirty-four were accepted without authorization. Now, authorization means that the transfer was approved by the Office of Pupil Placement in the City Hall, is that correct?

A. That is correct.

Q. Without authorization means that the principal in the particular school, without obtaining the approval of the downtown office, accepted the student, is that correct?

A. That is correct.

Q. Now, in the case of School 30, where you found fifteen from the School 16 District, thirteen of those transfers were approved by the downtown office and two by the principal without authority, is that right?

A. That is correct.

MR. GRIFFIN: I will offer Exhibit 280 in evidence.

THE COURT: 280 may be marked in evidence.

(Thereupon, Plaintiffs' Exhibit 280, previously marked for identification, was received and marked in evidence.)

MR. PANFIL: May I ask your Honor what happened to 279?

THE COURT: Yes, I was going to ask that myself. That was marked yesterday. We have no description of it. I think that was one of those additional exhibits shown to Mr. Girard.

MR. GRIFFIN: I intend to offer at a later time, 279 in evidence as part of the record.

THE COURT: When you find it, we will do that.

MR. GRIFFIN: All right.

BY MR. GRIFFIN:

Q Now, Mr. Girard, if a student goes to School 16, he then, after 6th or 7th Grade would go to Woodlawn Junior High School, is that correct?

A Yes, School 16 is a feeder school for Woodlawn Junior High School.

Q If he is granted a transfer and goes to, say, School 30, he would not go to Woodlawn, would he?

A No.

Q He would go to Lafayette or Grover for high school, is that correct?

A No, School 30 only goes to the 6th Grade, it's a feeder school into School 56.

Q He would then go to School 56 - -

A Which goes into Lafayette High School.

Q - - for two years, and then into Lafayette High School?

A Yes, sir.

Q Now, by granting a transfer of a white student out of the School 16 District, it meant that that white student would not go to School 16, it would not go to Woodlawn, is that correct?

A That is correct. The transfer is granted, and that student, if he is placed in another school, would follow the feeder pattern, wherever the feeder pattern is in that district.

Q And, to your knowledge, is one of the reasons why parents of white children from School 16 desire to transfer out of School 16 was to avoid eventually having to go to Woodlawn?

MR. GREGORY: Your Honor, I object to that. It is asking from this witness what the state of mind of some other particular individual happened to be.

THE COURT: All right. Well, I will overrule the objection. You may cross examine him about the source of his knowledge. I will permit him to testify.

THE WITNESS: Well, in my experience, I believe some of the parents were frightened to have their children go to Woodlawn Junior High. Woodlawn is predominantly a black school, and in my memory, I think at any time, they only

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one or two white kids registered at Woodlawn Junior High School.

BY MR. GRIFFIN:

Q So is it not true that both the siting of Woodlawn and the drawing of the boundaries of Woodlawn so that it was, when it opened and continues to be, over ninety-five per cent black, not only has an effect upon the Woodlawn School, but has an impact beyond the immediate district in terms of white children's attitude about going to a particular school that would eventually feed into Woodlawn?

A Well, Mr. Griffin, in answer to your question, I was not involved with the planning of the Woodlawn Junior High School District. This was something that the Common Council and the Board of Education had decided on, and they were looking for a school in that district to help the overcrowded conditions in the feeder schools, such as Number 8, 48, 17 and 16. In fact, if I recall, they were going to move the school further east into the district, I think they came out more than they anticipated.

Q I appreciate that you werenot directly involved.

My question relates to the total impact upon schools on the periphery.

A. By coming out toward Main Street, they tried to involve the schools on the west side of Main Street all the way to Richmond Avenue. I think their intent was to have white children attending Woodlawn so that there would be some sort of racial balance. I think this was the original intent.

Q. That never occurred, did it, the school when it started was over ninety-five per cent black?

A. The school, if I recall, was ninety-five or ninety-six per cent black. But again, the area, as I mentioned yesterday, you have an affluent society in that area, particularly around Oakland and Delaware there they go into private or parochial schools.

Q. Your department and the School Department granted, at least as of March of 1972, forty to fifty transfers of white children out of the School 16 District who would eventually have been students who would have gone to Woodlawn, is that correct?

A. Yes. As I said, every case is an individual case. There might have been hardships or medical reasons or psychological reasons. Every case is an individual case.

Q Now, let's turn from this area to School 54 - -

THE COURT: Excuse me. Mr. Girard, in your file do you have any record of a case where the application was denied?

THE WITNESS: Yes. I think on my report, your Honor, the records show the following transfer requests to School 38 were denied, and I listed four on my original report.

THE COURT: You don't have the information why they were denied?

THE WITNESS: No, we probably could find the denial form that was made out.

THE COURT: Do you know whether they were black or white?

THE WITNESS: Looking at the names, your Honor, I would say they are all white, the four families were white.

THE COURT: Do you have the names?

THE WITNESS: Yes, sir.

THE COURT: Well, one is on Niagara Street, that isn't School 30, is it?

THE WITNESS: No.

THE COURT: One address is 916 Niagara Street, that certainly is far out of the School 30 District and far out of 38 District, too?

THE WITNESS: Yes, it would be.

THE COURT: I'm not familiar with - - the other three may be all right.

BY MR. GRIFFIN:

Q May I see the other three, Mr. Girard?

A Yes, sir.

Q Well, one that is mentioned is on Plymouth, what school district is Plymouth in?

A Well, Plymouth would be probably either School 36 or School Number 3.

Q That is - -

A I believe these were requests that were denied. School 38 was also involved, I think the parents wanted the children to go to 38, we denied those.

THE COURT: In other words, these are not requests to go from 16 to 30? They lived on Niagara Street or Plymouth,

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and Plymouth is in District 36?

THE WITNESS: Your Honor, this report was a few years ago and I received this report from the school.

THE COURT: All right, go ahead.

THE WITNESS: I investigated it, and I don't recall if there are any other addresses involved.

THE COURT: All right. Go ahead, Mr. Griffin.

BY MR. GRIFFIN:

Q Now, I would like to turn back to just a few other instances of transfers that effect the School 54 District, Mr. Girard, and I think it probably would be faster if I take you through that part of your deposition, starting at Page 104, and relating first of all to Summit Avenue. Now, Summit Avenue is a street which is entirely within the School 54 District, is that correct?

A That's correct.

Q Now, I direct your attention to Page 104 of your deposition, and ask you whether, as of the time that you were testifying, which was June of 1974, there were four students at School 22, whose proper district was School 54, who lived on Summit Avenue?

A You brought to my attention that there were four students at School 22, that lived in School 54 District.

Q Right. They were 6th Graders or lower, and their school district was School 54, correct?

A Well, I don't recall what students you are referring to. Are these the same students we talked about yesterday?

Q No, they are not the same students.

THE COURT: Show Mr. Girard the deposition.

MR. GRIFFIN: All right.

THE WITNESS: There are no names mentioned.

BY MR. GRIFFIN:

Q No. You have a street analysis chart, is that correct?

A Yes.

Q Do you want to get that out of your records, that relates to - -

A School 22 and 54?

Q Right, the number of students.

A I'm looking at the description for School 22, which has grades from kindergarten to 8th Grade. We don't have Summit listed as a street.

Q Right. We have established that Summit Avenue is entirely within the School 54 District.

A. 54 District does have Summit Avenue, the entire street, that is correct.

Q What I want you to do is to look at your street analysis chart, which shows the number of students from each street that attend School 22, and see if you don't find that there were a number of students from Summit Avenue attending School 22, white students, who were from the School 54 District?

A. I know what you are referring to, Mr. Griffin, but I don't keep the street analysis charts. They are kept in Mr. Testa's office.

Q You didn't bring them with you? I think we marked them on your deposition.

A. I don't think I had them for 54.

THE COURT: Are they marked as exhibits?

MR. GRIFFIN: Yes, your Honor.

THE WITNESS: I had given you some charts from School 16 and 30 which I obtained from Mr. Testa.

THE COURT: Mr. Girard, why don't you wait for Mr. Griffin.

BY MR. GRIFFIN:

Q You brought with you all the exhibits we marked upon your deposition?

A Yes.

Q If you would get those out, I direct your attention - -

A Yes, I know which ones you are referring to. There are charts on School 16 and School 30 which are in this - -

Q Is this all the exhibits that we marked on your deposition?

A Yes, we have all the markings here.

THE COURT: Why don't you take those, Mr. Griffin, and look at them and see if you can find what you are looking for.

MR. GRIFFIN: Yes.

THE WITNESS: Here's the one for School 30. Here is one for School 38. These are all that I had.

MR. GRIFFIN: Looking at the transcript, your Honor, it does appear that Plaintiffs'

Exhibit 28 for identification was an exhibit produced from our file and used. It wouldn't have been retained in Mr. Girard's file. Now, if I can find that - -

BY MR. GRIFFIN:

Q I apparently can't readily put my hand on it, but directing your attention to Page 104 of the deposition, were you asked at Line 14:

"Q Now, there is one student, who is a Fourth Grade student from Summit Avenue, who attends School 22, isn't that correct?

A Yes."

Is that correct?

A Yes. If you are showing me the street analysis chart from School 22, yes.

Q Then we went to Vernon Street, and were you asked:

"Q Now, is Vernon Street in School 22 District?

A No, but I knew it is west of main, and it definitely feeds into 22 School.

Q But only in Seventh and Eighth Grade?

A Yes, sir, Seventh and Eighth Grade level.

Q Doesn't it show in the street analysis there was one 1st Grader, one 4th Grader and one 6th Grader or three children from Vernon in the 54 District who attend 22?

A That is correct, there are three in the 7th Grade."

Is that right?

A Yes.

Q Now, we have in the early grades from the School 54 District, three additional children going to 22 from out of the district, they came from Vernon Street, right?

A Yes, but if you recall, you mentioned there are some children in the 7th Grade at School 22 and, again, this could be another hardship case, as I explained yesterday.

THE COURT: Mr. Girard, if Mr. Griffin feels there is additional information - - I know I let some witnesses run on - - but it seems to me whether or not these youngsters attend 22 or 54, you know, it is yes or no. Now, it may be important in some cases to bring out the reason, but unless you have a definite reason, we ought to defer that.

BY MR. GRIFFIN:

Q You mentioned that sometimes you will receive medical reports or report from a doctor, which the parent will use and supply to your office in an effort to persuade your office that a transfer should be granted, is that correct?

A Yes, sir, Mr. Griffin. Can I explain that, your Honor?

THE COURT: Well, why don't you wait for the next question.

THE WITNESS: All right.

BY MR. GRIFFIN:

Q I want to show you an example of such an instance and ask you whether it was representative. Now, do you want to get this one out?

A What is the name of that?

MR. GRIFFIN: I would like to hand to the Court, from Exhibit 51, one of the transfer records that relates to a student from Summit Avenue who was

granted permission not to go to 54,
and we have the original here.

BY MR. GRIFFIN:

Q Now, this is a student who is a Grade 3 student and this student wants to go to a school other than 54, is that correct?

A That's correct.

Q This student lives on Summit Avenue in the School 54 District, right?

A That's correct.

Q This student had gone to Central Community School, which was a small privately operated school for early grade children that was operated, maybe it still is, at the Central Presbyterian Church by a private group, and that is located at Main Street and Jewett Parkway?

A That is correct. This particular young person is a white student, correct?

A From what I recall, the name seems to be white, yes. They supplied - - I don't want to reveal the name of the doctor or the student - - they supplied a letter from a doctor, is that correct?

A. That's correct.

Q. And the doctor writes that he is writing on behalf of the parents and the child to request that you grant the boy permission to attend School 64 instead of School 54, is that correct?

A. That is correct.

Q. Now, the parents and the child had already -- the parents and the doctor had apparently selected the school that they wanted the transfer to, is that correct?

A. That's correct.

Q. And whereas at the time this was granted, School 54 was in excess of sixty per cent black, and changing every year, School 64 was a predominantly white school, was it not?

A. Yes.

Q. Now, the doctor says that the boy has a poor health history, including a chronic bronchitis and pneumonia, and had had chest surgery, and so forth, he doesn't want to be placed in a situation where there would be a strain on his emotional constitution, is that correct?

A. Emotional distress, yes.

Q Then it says while in kindergarten at School 54, he responded with emotional distress to the structured authoritarianism of that school, even though he was not himself involved in any disciplinary action, and so forth, and so on. Now, was there any difference other than the racial composition of School 64 and School 54?

A No, primarily, the programs would be similar.

Q Isn't what the parent is saying, with a two page doctor's report - -

MR. PANFIL: I object to this, your Honor. The parent said nothing here, he's got a doctor's report.

THE COURT: The doctor's report, Mr. Griffin.

BY MR. GRIFFIN:

Q Isn't what the doctor's report is in effect saying is that it would be better this child went to a predominantly white school than a school that was in the range of fifty-fifty, white and black?

A Well, you could say that is what the doctor is saying, yes.

Q And would you grant transfers if people come in with a doctor's report that admittedly wouldn't be expressed in those precise terms, but in effect said for emotional reasons, I feel that this parent is justified in asking for their child to go to another school?

A It isn't only emotional here, I think, Mr. Griffin. I think he has outlined several ailments the child has, bronchitis, major chest surgery, a bone deformity, an asthma condition, there are other reasons here.

Q What difference does it make whether a child with a bone deformity goes to School 64 or School 54?

A 64 would be further, but we do allow transfers - -

Q I see. This child - - on that subject - - this child, with purported health problems, is now seeking to go to a school that is considerably farther from his place of residence than the school in the district in which he lives, is that correct?

A As I say, my point is that in regard to medical reasons, you can have a family across the street from School 81 on Tacoma Avenue, and if there is a medical problem whereas the child can't walk five blocks down to 21 School, if it is a physical problem, as such, we would consider such a transfer where the welfare of the child is concerned.

Q If you had a paraplegic who used a wheelchair to go to school, and he lived much closer to a school that was technically outside of his district, you would consider that?

A Yes, for medical reasons. This is the point I was trying to make.

Q If anyone comes in with a doctor's report of this nature, saying that it is for emotional stress, would you grant a transfer?

A Again, as the doctor explained, the emotional stress might aggravate the physical problems. I think you would have to consider that.

Q Hasn't it been the case that anyone, a white parent, who has the clout and means to come up with some kind of doctor's report, has a pretty high chance of getting a transfer?

A No. In the case of East High School in Genesee-Humboldt, in the last few years we only accepted reports from psychiatric clinics or psychiatrists.

Q You mean - -

A On emotional stress.

Q You mean since East High School has been the subject of such notoriety?

A. You can say it that way, yes.

THE COURT: As far as you know, Mr. Girard, that information set forth in the doctor's report that one school has structured authoritarianism and the other school has a free structure, there is nothing to that at all?

THE WITNESS: I think the doctor tried to point that out in regard to a school that stresses more authority, to the structural authoritarianism of the school. At School 54, while in kindergarten, maybe the youngster couldn't respond to this type of structure.

THE COURT: My point is, you being the person making the judgment of about who to grant a transfer, with great experience and knowledge through the years of the kinds of schools and how the schools are run, as I understand your testimony, you knew that essentially, as far as the program was run at 54 and as the program was run at 64 or 22, there was generally no difference?

THE WITNESS: No, as far as the program is concerned. Again, you have to take in the fact of emotional stress.

THE COURT: You have answered the question.

BY MR. GRIFFIN:

Q I would like you to get out - - Again, please don't identify it - - a 4th Grade student who lived in the low numbers of Starin Avenue, who is in School 54 District, but was granted permission to leave.

THE COURT: This would be not too far from Amherst Street on Starin?

THE WITNESS: Yes, I believe it is - - If I recall, it might even be near Main Street, maybe Starin near Main.

BY MR. GRIFFIN:

Q You know how Amherst goes up with a hump at the end of Starin, there is a T intersection over the railroad tracks?

A Yes.

Q And the low numbers are close to that part of Starin, as opposed to out at Kenmore Avenue, which would be the highest numbers?

A Yes.

Q Now, that place on Starin where this particular child resided was within the School 54 District, right?

A That is correct. Starin Avenue would be in the description for School 54.

Q Now, this is a 4th Grade student, right?

A At that time, the youngster was going into the 4th Grade, that is correct.

Q The remarks given for approving the transfer are that the class size is too large at the local parochial school, is that correct?

A Yes. The parents indicated that the classes were too large at St. Mark's, there was room available at 22 School.

Q Why is the class size of the local parochial school, from which the student is departing to go to a public school, why is that any reason to grant a transfer?

A. That was no reason. This was the reason for withdrawing the youngster from St. Mark's, because the classes were too large.

Q. The child is a child that should go to School 54, but gets permission to go to 22, right?

A. Yes.

Q. What is the reason that that is permitted in this case?

A. Well, as I say, this happened in September, 1969, and I can't recall all of those. I do remember there was some hardship involved, where there was a separation between the wife and the husband.

THE COURT: Mr. Girard, we know you can't remember all the details here. I think that unless there is something very unusual, you had better stick to your records. There is nothing on the record, there is nothing under reasons or significant data, recommendations from guidance counselors, psychologists or doctors or anyone else, right?

THE WITNESS: No, in this particular case there wasn't.

THE COURT: Next question.

BY MR. GRIFFIN:

Q That is one more child who is permitted to leave School 54 - -

A. May I interrupt one second, your Honor?

THE COURT: Mr. Griffin, ask a question, please.

BY MR. GRIFFIN:

Q I have one more that I would like to focus on at this moment and then I am pretty close to concluding my examination.

A. My elaborate on this one?

Q No.

THE COURT: Mr. Girard, you have such a tremendous amount of information, and if we let any witness do that, we would never get to the end of a trial. The rules are that each lawyer can ask about what he feels is material. Now, whether or not the information you have is material or irrelevant, maybe Mr. Gregory knows, and he will bring it out. All right.

BY MR. GRIFFIN:

Q I am now looking at another approved transfer for two white children, and this time they resided on Crescent Avenue, on that part that would very definitely be in the School 54 District, isn't that true?

A Yes, I believe 54 takes them from 1 Crescent Avenue up to about 400 Crescent. I think that would be correct.

Q This is an address substantially below the 400 mark, right?

A Yes.

Q All right. Now, these are two children who, as of September, 1969, seeked permission to go to School 22, is that correct?

A That's correct.

Q As a matter of fact, they were already at School 22, right?

A That's correct.

Q And apparently, the lack of an authorized transfer somehow surfaced and it came to the attention of your office, is that correct?

A That's correct.

Q That was approved to remain at 22, right?

A Yes.

Q That is the only reason that was given to approve that transfer, was to remain at School 22, a school which was outside of the district of their residence, correct?

A That's correct.

MR. GRIFFIN: At this time, your Honor, I would offer in evidence Exhibit 279, which contains the two denied transfer requests that were referred to yesterday to Bennett High School, and Exhibit 51, and that contains many approved transfer requests that has been identified on the deposition of Mr. Girard. I would later offer into evidence most of Mr. Girard's deposition, and much additionally that identifies and describes these exhibits.

Do you have any objection?

MR. PANFIL: Wait until I look. If the Court please, 51 reads, "Excerpts from Board minutes - - I'm sorry, strike that. It doesn't It reads, "Large number of approved transfer records relating to various schools and identified upon the deposition of Mr. Girard." Now, are all of these that were submitted for identification as 51 being offered in evidence or part of them?

MR. GRIFFIN: All of them. Some of them we have discussed particularly in Mr. Girard's testimony. Many of them we have not, and they are discussed in the deposition which I am offering in evidence.

MR. PANFIL: The entire deposition will go into evidence also?

MR. GRIFFIN: Most of it. I will later designate those parts that I offer, but all of the portions of the deposition that discuss and identify and explain these transfers will be offered.

THE COURT: Mr. Griffin, will you indicate later, the pages to Mr. Panfil and Mr. Gregory?

MR. PANFIL: I am concerned that there may be other pages in the deposition that--

THE COURT: Mr. Griffin will indicate to you the portions that he desires to offer. If you desire to offer any other pages, you let me know.

MR. PANFIL: Very well.

THE COURT: In a case like this, where there is no jury, the Court's view is that if either side feels that something is material and relevant, I am going to receive it, and then let you argue, let the other side argue about materiality and relevancy, unless there is something which clearly ought not to come in.

MR. PANFIL: I understand, your Honor. As long as the Court follows that policy through the end of our trial, we will have no problem.

THE COURT: I certainly will. 279 and 51 may be marked in evidence.

(Thereupon, Plaintiffs' Exhibits 51 and 279, previously marked for identification, were received and marked in evidence.)

THE COURT: Mr. Griffin, is there anything else?

MR. GRIFFIN: No, your Honor, nothing further at this time.

THE COURT: Mr. Panfil?

MR. PANFIL: I have no questions of this witness.

THE COURT: Mr. Gregory?

CROSS EXAMINATION BY MR. GREGORY:

Q Mr. Girard, I'm referring to Exhibit 6 in evidence which is the ethnic census of the Buffalo Public Schools for the year 1973-74. Will you turn to

* * *

THE WITNESS: No. I think there is no written policy, every case is judged on its individual merits.

THE COURT: Did it ever come to your attention where a principal would write to you or call you up and say, 'This young man was transferred here - -'

THE WITNESS: It has been brought to my attention that the youngster may not be passing the language, recommending he go back.

THE COURT: I am talking about the transfer, do you have any records of people being retransferred back to the school in his district?

THE WITNESS: It isn't necessary, no. That is all you have to do is send him back to the school in the district. You don't need an authorization to go to a school in your district, your Honor.

REDIRECT EXAMINATION BY MR. GRIFFIN:

Q It is true, is it not, that there is no follow-up procedure where you get a current report back from any school where a transfer was granted?

A No, we have no follow-up procedure.

Q If somebody starts the freshman year in South Park on the basis of Polish, you don't have any procedure where you get a record coming back to you the following year that they are taking Polish, and the third year that they are taking Polish, is that correct?

A We would not get it, but I know the school would keep their own records of that.

Q The school would keep their own records?

A Yes.

Q Isn't it also true that the policies are that once the principal of either a high school or an elementary school has an original transfer approval, say for 3rd Grade or first year high school, that is sufficient authorization for him to permit the child to keep coming back year after year?

A Yes, that's correct.

MR. GRIFFIN: All right.

THE COURT: Thank you, Mr. Girard.

MR. GREGORY: Your Honor - -

* * *

THE WITNESS: No. You can tell by looking at this one - -

THE COURT: You don't know whether they are a first generation family or a fifth generation family, do you?

THE WITNESS: Well, we get parents that come in - -

THE COURT: We are looking at one particular record there, that record. Did you make any study of that at all?

THE WITNESS: Just the fact that they are from St. Stanislaus is good enough for us. They have the Polish language at St. Stanislaus, that is all we needed.

BY MR. GREGORY:

Q All right, that is all with reference to this. In any event, that was why they were approved?

A Right.

Q Let me ask you this, the language transfers at East High School - - not East High School - - the language transfer policy, to your knowledge, how long has that policy been in existence?

A Well, I would say at least eighteen or twenty years.

We come up with the policy to allow youngsters to transfer to schools outside of their district.

Q As a matter of fact, isn't it true that there are a number of - - during your experience with this transfer in this area - - isn't it true there are a number of black students that have been permitted to transfer out of East High School for the purpose of taking languages?

A Absolutely.

Q Could you just enumerate some of the schools they have been permitted to transfer to?

A Yes. We used to get a number of graduates from School 37, and most of the youngsters from 37 requested Grover and Lafayette High School, they asked for Italian.

Q Was it offered at East High School?

A No, it wasn't.

Q Were these transfers granted?

A Yes.

Q Now - -

THE COURT: Now, Mr. Girard, 37 is in what district?

THE WITNESS: East High School's district.

It is a large school, they had like fifteen eighth graders, they had two hundred kids that graduate every year.

THE COURT: And they were permitted to transfer to Grover?

THE WITNESS: Yes.

BY MR. GREGORY:

Q What I am getting to is this is not a policy that was recently commenced - -

A No, it wasn't

Q - - and applies only directly to East High School?

A No, it wasn't, no.

Q This is a particular policy that has been a long-standing policy - -

A The policy - -

Q - - and applies to all the high schools in the City of Buffalo, right?

A It applies to everyone, it applies to everyone in the City.

Q Now, in July of 1972, the Board of Education adopted a policy with respect to transfers, is that correct?

A That's correct.

* * *

MR. GREGORY: I object to that.

BY MR. GRIFFIN:

Q - - when the policy of the Board was that if the students want a language at a school, it will be offered at the school?

MR. GREGORY: I object to the form of the question.

MR. GRIFFIN: I will withdraw discrimination.

BY MR. GRIFFIN:

Q You told us, and it is in the stipulation, that whenever at least fifteen students in a high school district want a language, it is the policy of the Board to offer it right at the school where they reside, correct?

A Yes.

Q You are not anxious to have this wholesale tranferring around the City, right?

A No, never anxious to have that.

Q The policy always is is that if you have an interest in a language at a particular school, you want to offer the subject, right?

A. That has been the policy.

Q. Not only do we have an absence of Polish at East, and an absence of Russian at East, and an absence of Hebrew, we now find we have an absence of Italian at East, so that students, regardless of whether they are white or black, at East, who want to take Italian, have to leave the district. Was that true from the 60's to 1972?

A. As far as I can recall, yes.

MR. GRIFFIN: That is all.

THE COURT: Anything else? Nothing else, thank you, Mr. Girard.

(Witness excused.)

MR. SCHWARTZ: Just one moment, your Honor. Our next witness is Councilman Johnson.

THE COURT: Excuse me, Mr. Griffin and Mr. Gregory and Mr. Girard, you are putting a number of documents and records back into your case, are any of those exhibits in the case?

MR. GRIFFIN: No, your Honor. Thanks to the cooperation of the School Department and Mr. Girard's office, on the deposition they provided us with the complete Xerox of all exhibits so we wouldn't have to take any of their original records.

MR. SCHWARTZ: Mr. Horace Johnson, please.

HORACE C. JOHNSON, called as a witness on behalf of the Plaintiffs, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SCHWARTZ:

Q You are presently a member of the Common Council of the City of Buffalo?

A Yes, I am.

Q Thank you. Now, before we turn to matters relating to the Common Council, there was an interesting matter that just came up with the last witness. Mr. Johnson, do you have a daughter attending Bennett High School?

A Yes, I have.

Q Is she in the Honors Program?

A No, she is not.

MR. GREGORY: I object to this, immaterial, irrelevant.

THE COURT: Overruled.

BY MR. SCHWARTZ:

Q What language is she taking?

A Russian.

Q Thank you.

A She has completed her Russian, now she is a senior.

Q Now, Mr. Johnson, how long have you been a member of the Common Council of the City of Buffalo?

A I'm in my - - near the end of my ninth year.

Q That means you started in 1965?

A I was elected in 1965 while I was a member of the Board of Supervisors. I took office January 1st, 1966.

Q Now, that means you were there in 1968 as a member of the Common Council?

A Yes, I was.

Q Did there come a time in 1968, in the spring of 1968, when an issue about portable relocateable classrooms arose, when the Common Council was asked to fund those?

A Yes, there did.

Q Now, do you recall, from perhaps your memory and as it is stipulated in this case, that the Common Council enacted an ordinance relating to that and that was an amendment of the Building Code, amending the first paragraph of Section 201 of Chapter 12 of the Ordinances of the City of Buffalo, do you recall that?

A I recall, I would have to see it.

Q That appears at Page 36 of the stipulation.

A That is correct, sir.

Q Thank you, Mr. Johnson. Now, do you recall the discussions, debates, conversations and the like, relating to the consideration and enactment of that ordinance?

A Yes, I do.

Q Okay. And in connection therewith, do you recall whether racial considerations were relevant to the enactment of this ordinance in the minds and in the intent of the members of the Common Council?

MR. PANFIL: Objection.

MR. GREGORY: I object to the form.

THE COURT: I will sustain the objection. Perhaps we should have him tell us what occurred.

BY MR. SCHWARTZ:

Q Well, were racial matters raised by members of the Common Council in the discussion of this ordinance?

A Yes, they were.

Q Could you tell us what was said, by whom, and roughly when?

A I think I would have to - - to really get in detail and mention all the names, I would have to have the resolution before me.

Q Let me hand you then, Plaintiffs' Exhibit 170 for identification, Exhibit 173 for identification, Exhibit 174 and 182 - - I'm sorry - - strike 182.

A If you would give them to me individually, I would be able to do it better.

Q I will lay them out for you.

A What I have before me is 170 from the Common Council proceedings, a resolution introduced, Item 161, by Mrs. Slominski, Messrs. Lyman, Lewandowski, Buyers and Elfvin.

MR. PANFIL: May I have that identification again?

THE COURT: Mr. Johnson, why don't you repeat it?

THE WITNESS: I am looking at the Common Council proceedings, Item Number 161 of May 14, 1968, the resolution introduced by Mrs. Slominski, Messrs. Lyman, Lewandowski, Buyers and Elfvin entitled Prohibition of the use of Relocateable Classrooms. The item was adopted. The ayes were Buyers, Elfvin, Franczyk, Lewandowski, Lyman, Perla, Slominski and Whalen. Those who voted no were black, Gorski, Johnson, Makowski, Mitchell, Morrisey and Regan. The context of this was the fact that it was requesting - - for the purpose of changing the Building Code so that portable classrooms couldn't be located on the site of certain schools, the fear being that it would bring in additional people from outside of the neighborhood, namely, blacks.

MR. GREGORY: I object to the latter part of that answer. That is strictly a conclusion as to the state of mind of other individuals. The ordinance says nothing about the latter aspect of the thing.

THE WITNESS: I testified on the basis of the fact that what happens in the Council and what was done in the Common Council caucus are two different things.

THE COURT: Excuse me, Mr. Johnson. First of all, Mr. Johnson, if you are going to refer to minutes or a record of the proceedings, that is fine, but say so. And then when you go off, you are going to then tell us about what your recollection was of certain events, make clear that you are not referring to the resolution anymore.

I think that in part was what Mr. Gregory's objection was pointed at. Can you now, by looking at that, can you recall any event, any discussion at the meeting?

THE WITNESS: The leading discussion at the meeting was by Councilman Buyers and Councilman Lewandowski and Councilman Slominski. Mr. Buyers, steadfastly, took the position, along with Lewandowski and Mrs. Slominski that the placing of portable classrooms throughout the City was a method to be used by the Board of Education to achieve racial balance in the schools.

MR. GREGORY: May it please the Court, he is obviously testifying as to matters that are contained in public records.

MR. SCHWARTZ: Not necessarily.

THE WITNESS: Yes.

THE COURT: Just a minute. Well, he is partly and he is not partly. All right, Mr. Gregory, you have some problem?

MR. GREGORY: No, I have no problem, but I would like to offer an objection to the Court relative to the testimony now being given by Mr. Johnson. In my - -

MR. SCHWARTZ: He can cross examine on that.

THE COURT: All right. You have finished your statement?

MR. GREGORY: No, I haven't. I would like to object to the testimony now being given by Councilman Johnson, because it is apparent and very obvious to me that he is referring to comments made by councilmen in the Council meeting, and I respectfully submit to the Court that, as Mr. Schwartz has presented excerpts of the minutes of that particular meeting, all the other minutes of that particular meeting are available to the Court, and I respectfully submit that the minutes of that particular meeting would, in fact, be the best evidence, and not what Mr. Johnson recalls particular councilmen said. There are official minutes of that meeting, as evidenced by the fact that he holds in his hand now, as evidenced by Plaintiffs' Exhibit 170, 173 and 174, documentation of what councilmen said, and I respectfully submit that it would be in the best interest of all concerned that if this witness is going to be testifying with respect to what councilmen said at any of these meetings, that instead of having him testify, we have the minutes reflect what the various councilmen said toward this issue.

THE COURT: May I suggest this? First of all, a litigant in any lawsuit may choose to say to the Court, 'I believe that there is a document and, in my opinion, in my judgment, the following excerpts are relevant and material,' and offer those in evidence. The other side may say, 'Judge, in my opinion, other portions are relevant or the whole document is relevant,' and I agree with you. Now, here, as far as receiving in evidence the excerpts, we can do that. If you want to put in the entire proceedings, you may do that, and I will receive it as marked in evidence. Mr. Johnson, as I understand it, is telling us about not only what occurred at the Council meeting, but he is also testifying about what he heard or what was said by various councilmen in caucus or any other place.

THE WITNESS: That is correct, plus - -

THE COURT: Will you please let me finish?

THE WITNESS: Yes.

THE COURT: What I want to be sure of is that when you tell us about what occurred in the Council meeting in your recollection, if that is necessary to set this in focus, please say 'In my recollection, at the Council meeting, it was said,' and we will have the record, which, of course, would be the official record, and then if you want to tell us about what happened at some caucus or some other informal meeting you had with somebody, you may do that, but be sure to tell us that this happened in the caucus or some other time.

THE WITNESS: I understand, your Honor, but what is before me is an item in the Common Council proceedings, it is not the official minutes of the Common Council. The official minutes are recorded on tape. We can subpoena the tapes.

THE COURT: Mr. Schwartz, next question.

MR. SCHWARTZ: That was the only point I wanted to make, that these are not minutes.

THE COURT: All right. I will permit the questioning to continue and, Mr. Gregory, of course you may cross examine or you may bring in other relevant material, if you feel it is appropriate.

BY MR. SCHWARTZ:

Q Now, do you recall any other remarks, statements, declarations or the like, made at either a caucus meeting or a conversation in the corridor or anyplace else by any member of the Common Council, relating to the racial elements in consideration of the portable classroom issue and, if you do, please, to the best of your knowledge, try to give us the exact language, who said it, where and when?

A. Well, I would have to answer in this manner. Many of our discussions about the actions which are going to occur at the Common Council meeting on a Tuesday are discussed in a caucus on a Monday and, as a result of that, councilmen are polled as to how they are going to vote, and we have a much more open and frank discussion. In this instance, where councilmen say, 'Under no conditions will I vote for this resolution,' this sort of thing, they make statement to the effect, 'My constituency would kill me if I did this, I'm not in support of this,' and when we actually come into the Council meeting - -

THE COURT: Mr. Johnson, I think those are background things. But each witness gets on here and he has so much background material that we will never end this case unless we can get to what was said. Now, as far as the circumstances under which it is said, if it is important, the lawyers will bring it out. Do you recall what the conversations were?

THE WITNESS: Yes. The conversation by Lewendowski talked in terms of being totally in opposition, because his concept was for neighborhood schools, and this was supported by - -

BY MR. SCHWARTZ:

Q "This was supported," you mean that resolution was supported?

A This line of reasoning was supported by additional councilmen; Perla, at times Gorski, at different times - - I can only refer to the comments of the democratic councilmen who were attending the caucus, and you understand, of course, over the period of years I have been there, they have changed, some of them have changed, but in our caucus, the leading advocate would be - - thatis, at that time in 1968, it was Lewandowski and Carl Perla, Jr.

MR. SCHWARTZ: Thank you. We would like to offer in evidence those three exhibits, together with a fourth exhibit, 182, which involves the approval of the retention of then Mr. Frank Bayger as counsel to appeal the decision with respect to the portable classrooms, the Court decision.

MR. PANFIL: Your Honor, could we have some degree of identification as to what the other ones are?

THE COURT: There is 170, 173, 174 and 182.

MR. SCHWARTZ: 170 is the resolution on the prohibition of the use of portable classrooms. 173 is the actual enactment of the ordinance on May 28, 1968,

* * *

THE COURT: Mr. Panfil, I bawl you out for breaking the rules, and Mr. Schwartz ~~goes~~ goes ahead and breaks the rule.

MR. PANFIL: Thank you, your Honor.

THE COURT: Consider yourself bawled out, Mr. Schwartz.

MR. SCHWARTZ: Yes, your Honor.

THE COURT: This will be the next exhibit. Do you have many more exhibits to mark?

MR. SCHWARTZ: That is the only one, your Honor.

(Thereupon, document referred to was marked Plaintiffs' Exhibit 281 for identification.)

BY MR. SCHWARTZ:

Q Mr. Johnson, I would like to ask you about the bond resolution in connection with the West Hertel Middle School. I show you a series of exhibits that have been marked earlier, relating to that. Perhaps you might glance at them for a moment to familiarize yourself with them.

A (Witness examines documents.)

MR. SCHWARTZ: To familiarize the Court and counsel with the issue, we are referring now to Page 38, Paragraph 122 and 123 of the stipulation, which point out that by July 25, 1968, the West Hertel School was approximately half to three quarters completed, and on that date, the Common Council refused to authorize the bond of $997,000 to complete the school, while approving other school construction bond issues, and there are several more paragraphs relating to that on the next page, and ultimately that the Council did ultimately approve the funding.

BY MR. SCHWARTZ:

Q Now, I would like to ask you the same question with respect to this matter that I asked you before, Mr. Johnson; namely, do you recall any remarks relating to racial considerations or conversations or declarations or statements by members of the Common Council at the time that the bond issue was disproved, at the time that it was held up and, if you do, would you please set forth, to the best of your recollection, the names of the people who made these remarks or conversations, and the like, where they were made, and the dates?

MR. GREGORY: Your Honor, I will offer the same objection.

THE COURT: Overruled.

THE WITNESS: It would be difficult for me to offer the dates.

BY MR. SCHWARTZ:

Q The times, as close as you can?

A The times. In looking over the exhibits, I must point out that some of them deal with unfinished business, which means at the end of the Council meeting, there are items we take off the table for consideration.

Q Don't refer directly to those.

THE COURT: Just about the West Hertel Middle School, about the bond issue.

THE WITNESS: The primary issue that was argued and debated on the Council floor about the West Hertel Middle School was the fact that the Board of Education allegedly promised it would be a junior high school, and later they changed it to a 4-4-4 school, and this, of course, meant that youngsters coming into West Hertel would be coming in from feeder schools, and Councilman Buyers here again was the leading speaker in opposition to this, and had been joined by many others at this particular time, because of the feeder school concept, that if you went to a junior high school in a certain location, you were entitled to go to a high school in that same area.

BY MR. SCHWARTZ:

Q The remarks in the statements?

A The remarks and statements were they didn't want outsiders coming into the community, they didn't want blacks coming from feeder schools into various schools.

Q Do you recall who made these statements and in what context?

A Some of the statements were made in the context of a caucus. Some were made to me individually as to objections, 'I'm in a jam, what do I do. I have to vote a certain way.'

Q Do you recall who said - -

A Oh, yes.

Q - - some of these things?

A Carl Perla said many of these things to me. Bill Buyers said certain things to me, that he was in a jam. Councilmen - - It is characteristic of councilmen who represent districts, to try to represent districts in the manner they feel the districts would like to have them represented. At this particular time, I guess things were going on, as far as groups advocating the support for neighborhood schools.

Q Did any of them mention that to you - -

A Yes.

Q -- as a factor, if so, who did?

A These go back into the year of 1968.

Q The summer of 1968?

A The summer of 1968, and my conversations would have been with Buyers, Lewandowski, I think -- I'm not certain -- I think I better check and see. Well, of course, Bill Lyman was always shooting off at the mouth and Whalen --

Q In connection with these matters?

A Yes, they were --

THE COURT: Mr. Johnson, I am sure if you don't remember --

THE WITNESS: I definitely remember Whalen and Lyman.

THE COURT: Don't guess if there is any doubt.

THE WITNESS: There is no doubt in my mind about Buyers, Lewandowski, Lyman, Whalen and Slominski, no question whatsoever, and Perla.

THE COURT: Can you recall now -- we realize it is six years ago -- about what was said?

THE WITNESS: What was said to me like, I will give you an example, Carl Perla, was a great friend of mine, we have lunch, he said, 'Billy, I would like to vote for this, I just can't.'

BY MR. SCHWARTZ:

Q Did he tell you why he couldn't?

A Yes.

Q And that was - -

A The pressure that was being placed upon him.

Q Pressures of what kind?

A Pressure from the people he represented and other councilmen, et cetera.

Q Did he indicate by any word, in particular, that those pressures related to the racial factors in this issue?

A Yes, he did.

Q Now, do you recall any other specific examples by specific people of remarks of that or related nature on this topic?

A Councilman Lewandowski.

Q Could you give an example of that and where and to

* * *

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 2:20 P.M.

HORACE C. JOHNSON, called as a witness on behalf of the Plaintiffs, having been previously duly sworn, resumed and testified further as follows:

DIRECT EXAMINATION BY MR. SCHWARTZ (Cont'd.):

Q Mr. Johnson, I'm afraid it is not totally clear in my mind exactly where we were in the questioning when we stopped. I think there was a colloquy at the end. Let me ask you, if you would, to just take a minute to indicate, if you recall, the names and the context in which members of the Common Council expressed sentiments about completing the West Hertel Middle School which related to the racial implications of that completion?

A I stated earlier that was done in two fashions; one partly during the caucuses and then on the Council floor, the arguments that they were withholding the funds because the Board of Education promised to make it a junior high school, not a 4-4-4 plan. Councilman Buyers was a leading exponent of that, and it was supported by Lewandowski, Slominski and others I had mentioned this morning.

Q And this was at the Common Council meeting?

A In the Common Council meeting.

Q What did these people say, to the best of your recollection, as close as you can get to the words they used?

MR. GREGORY: I will object to that, for the record, as long as the witness is going to be relating conversations that occurred in Council meetings. The best evidence would be the minutes of the meetings themselves.

THE COURT: All right, I agree, Mr. Gregory, but I think we should let him testify. Go ahead.

THE WITNESS: I would like to point out to the Court that if I read, if I quote from the Common Council proceedings, I am not quoting from the actual tapes of the minutes, which the Common Council proceeding, in my judgment, don't reflect the actual minutes of the Council.

BY MR. SCHWARTZ:

Q I see. If we had the minutes of the meeting, we might not have everything?

A. If you had the tapes here, the tapes can be played and heard.

THE COURT: You give your recollection of what was said.

THE WITNESS: The argument centered largely around the fact, one, the Board of Education was changing the school from a junior high school to a 4-4-4 Plan, that such a plan would induce outsiders into the neighborhood.

BY MR. SCHWARTZ:

Q Did the nature of these outsiders come into the discussion?

A. Yes.

Q What was that nature?

A. The feeder schools and schools identified as schools that were all black schools, largely black schools.

Q Okay. What about in caucus, comments made and by whom?

A. In caucus we had a situation whereby many, many councilmen expressed the fact that they were not in favor of integration in the school system.

Q Can you give us some names?

A Yes. Whalan, Carl Perla, Jr., Lewandowski on the democratic side, there would have been questions from time to time by Gorski - -

Q There are some of the names of the councilmen. At that time, of course, John Elfvin was only involved from the point of view of a technical aspect, in discussing the carrying out of the construction of the building themselves, the portable classrooms. We had considerable argument about making the school properties ugly, et cetera.

Q We are talking about the West Hertel Middle School.

A The West Hertel Middle School, it came up that - - the fact that councilmen talked in terms of the fact that, as we always do, about our constituency and being elected, and this is a major issue.

Q How was that related to the racial aspect of the completion of the West Hertel Middle School?

A They have to run for re-election. At that particular time, there were many - - some organizations in the community, one headed by Marjorie Lovejoy and being spearheaded by Bill Lyman and Mrs. Slominski that were taking a certain position which led to the freedom candidates that were running.

Q Was this related to the racial issue?

A Yes, it was.

Q There came a time when the money was, in fact, voted for completing the West Hertel Middle School, is that correct?

A That is correct.

Q Can you explain how that came about, in view of the prior opposition, if you know?

MR. GREGORY: May it please the Court, I object to any further testimony on this score after the witness has testified to the fact that the money was voted in the form of the passage of the resolution by the Common Council. I can't see any materiality or any testimony how this came about, the facts speak for themselves.

THE COURT: I will overrule your objection and permit you to argue later. Overruled.

BY MR. SCHWARTZ:

Q. Would you answer the question.

A. The normal pressures placed upon councilmen, meetings were called and - -

Q. Pressures of what kind?

A. Occasionally, pressures are placed upon the district councilmen, sometimes through a majority leader, Delmar Mitchell, at that time, sometimes direct calls from the Mayor's office, sometimes a call from the County Chairman's office.

Q. The Democratic County Chairman?

A. That's correct.

MR. SCHWARTZ: I offer in evidence, the Council proceedings which contain the various resolutions, and that is Exhibit 180, 181, 183, 184, 185 and 281.

MR. GREGORY: I have no objection to the admission of those documents.

THE COURT: They may be marked in evidence.

(Thereupon, Plaintiffs' Exhibits 180, 181, 183, 184, 185 and 281, previously marked for identification, were received and marked in evidence.)

BY MR. SCHWARTZ:

Q Now, Mr. Johnson, in connection with the middle school question, Paragraph 124 and 125 of the stipulation, which appears at Page 39, refers to planning funds for middle schools, and it points out that at the meeting of July 25, 1968, the Council refused to authorize the bond issue of $380,000 for planning, as was referred to here, the remaining middle schools. The integration purposes of the bond issues were clearly set out, and 125 says on June 3, 1969, the Council tabled a proposal for $190,000 in planning funds for middle schools. I show you Plaintiffs' Exhibits 178 and 179 for identification, which deal with the bond resolution of $380,000. Are you familiar with those?

A Yes, Item Number 11, which was approved, yes.

Q Thank you. And now, do you recall this matter of the planning money for the middle schools which took place in 1968 and then again in 1969?

A Yes, I do.

Q The tabling and refusal to both funds?

A Yes. This is the item I think here in which we have a refusal for voting funds.

Q I will ask you the same question I asked you before with respect to this matter. Do you recall specific names of members of the Common Council who expressed themselves, either in the meeting, in caucus or otherwise, with respect to racial aspects of this planning money, and how it related to racial integration in the school system?

A Well, in the Council on the item, the one that passed, those that voted in the negative were the same; Franczyk, Lewandowski, Lyman, Perla, Slominski and Whalen.

Q These are the ones who voted against the planning money?

A Yes. This is the occasion that it was carried, the approval was lost, and those were - - all of the Council members were not present, this is the one during the time when County Executive Regan was pointing out to us, to the Council, "Let's not kid ourselves, this is a racial situation, and let's move ahead with the business at hand."

Q Did any of those people comment, either to you privately, in a caucus, on the floor or in another context to you, or that you are aware of, about the racial implications and aspects and how this affected their vote or might affect their vote or what have you?

A Yes, sir.

Q Would you give us their names?

A Councilman Lewandowski, Councilman Perla, Councilman Lyman and Councilman Whalen.

Q Where?

A Various places.

Q In what context did they express - - what did they say?

A The difficulties they would have in justifying their votes in the communities that they represented. Councilman Whalen wanted to run for councilman at large. He did run on a ticket based on racial discrimination in schools.

MR. SCHWARTZ: Okay. I would like to offer these in evidence, and that is Exhibit- -

THE COURT: Can you recall what his position was on that subject, Mr. Johnson?

THE WITNESS: Councilman Whalen was consistently in the negative, along with Councilman Slominski on all items, and Councilman Lewandowski on all items pertinent to schools, involving monies for the construction or changing or the planning of middle schools, that sort of thing, and new schools in certain areas.

BY MR. SCHWARTZ:

Q Mr. Johnson, I'm afraid I forgot to ask you before, were you chairman of the committee which has specific jurisdiction over these questions?

A No. I was chairman of what we call the Special Committee on Public Education. The majority of the questions that we are discussing here came before the Common Council in the form of resolutions, and the action was taking place in the Common Council. The thing that was referred largely to the Special Committee, were complaints, things to point out there was trouble in the school, to discredit certain individuals, and it was necessary for me to call meetings with members of the Board of Education, and so forth.

MR. SCHWARTZ: Thank you. I am offering Exhibits

* * *

will conclude with Mr. Johnson.

MR. PANFIL: No objection, your Honor.

THE COURT: They may be marked in evidence.

(Thereupon, Plaintiffs' Exhibits 192 and 193, previously marked for identification, were received and marked in evidence.)

THE COURT: All right, you may continue.

BY MR. SCHWARTZ:

Q Finally, Mr. Johnson, during your time in the Common Council, you have made numerous efforts to try to get fair housing and other kinds of ordinances adopted to end discrimination in housing in the City of Buffalo, is that correct?

A. Yes, I have.

Q Have these been successful

A. No, they have not.

MR. SCHWARTZ: I offer Exhibits 171, 172, 175, 176, 177, 186, 189 and 244, which are various official proceedings of the

* * *

A I know because I was there. You don't know, you were not there.

Q Let me finish, will you? Thank you. You know, as a matter of fact, that this particular ordinance, the history of it was it was passed by the council, vetoed by the Mayor, his veto was overridden - -

A Yes.

Q - - and subsequently the validity of this ordinance was tested in court, and the Court determined that the ordinance was, in fact, invalid.

A That is correct.

Q So that today this ordinance is not in effect in any type of construction, with respect to additions, that this particular ordinance sought to limit, are no longer in effect, is that right?

A You are reciting exactly what I was saying. It was invalid. We were so informed by the Corporation Counsel, but nonetheless, it passed. Personally, in my opinion, it was because of racial discrimination.

Q Well, of course, that is - -

A That is my opinion.

Q That is your opinion.

A I'm entitled to my opinion, you are entitled to yours.

Q Of course, I have offered no opinion.

* * *

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 3:30 P.M.

MR. GRIFFIN: Mr. Einach, please.

VICTOR EINACH, called as a witness on behalf of the Plaintiffs, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GRIFFIN:

Q Mr. Einach, what is your present occupation?

A I'm a part-time temporary business agent for the Musicians Union.

Q And within recent date, were you employed by the New York State Division on Human Rights?

A Correct.

Q And when did you last - - When were you last employed by the New York State Division on Human Rights?

A I retired in January, 1973.

Q And the New York State Division on Human Rights is an agency of the State of New York which is charged with enforcing the laws against discrimination in the State, is that correct?

A That is correct.

Q And before it was named the New York State Division on Human Rights, what was the title of the Agency?

A State Commission Against Discrimination.

Q And when did you become associated with that particular agency?

A Originally, in 1941, it was a temporary agency out of the State War Council, but the State Commission Against Discrimination came into being July 1st, 1945.

Q Were you employed in various capacities by that agency from 1945 through 1974?

A Correct.

Q Now, before that time, had you been associated with the Municipal Housing Authority of the City of Buffalo?

A Correct.

Q And approximately when?

A 1939 to 1940.

Q Can you tell us approximately when Buffalo Municipal Housing Authority was established?

A It was prior to that time, I can't tell you what date. I came in in 1939 when they went into a Tenant Selection Division.

* * *

black assigned to the Commodore Perry?

A. Not that I recall, no.

Q. When Willert Park was opened, were all blacks who wanted municipal housing assigned to Willert Park?

A. Yes.

Q. Now, was there a custom in practice with respect to the assignment of blacks to municipal housing?

A. There was a practice, yes.

Q. This was a practice that was followed by the Municipal Housing Authority, itthat correct?

A. By the staff of the Housing Authority.

Q. By the employees of the Housing Authority?

A. Yes.

Q. And what was that practice, as far as where blacks would be assigned to live?

A. Willert Park at that time.

Q. What was the practice with respect to where blacks would not be assigned to live?

A. Well, they were assigned to Willert Park.

Q. They were not assigned to the other two, is that correct?

A. Same idea. Some of the whites who wanted to live at Willert Park were not put there.

* * *

I will reserve decision on your motion.

MR. GREGORY: Thank you.

(Thereupon, Plaintiffs' Exhibit 229, previously marked for identification, was received and marked in evidence.)

BY MR. GRIFFIN:

Q This is in the record and I am not going through every part of it, but I want to point up a few aspects of it, Mr. Einach. You point out on Page 3, after telling us about Lakeview, Commodore Perry, Willert Park and Kenfield, that Commodore Perry, Lakeview and Kenfield have always had white tenants, Willert Park has always housed Negroes, that is, through 1946, the date of this report, correct?

A Yes, except if you go down another paragraph or two, Talbert Courts and Carver Courts, which were in the same area as Willert Park, housed Negro people too.

Q You mean the MHA built a couple more black facilities, right?

MR. GREGORY: Your Honor, I object to the characterization of the facilities as black.

MR. GRIFFIN: We will get to that.

THE COURT: I will sustain the objection, Mr. Griffin. Mr. Einach, wait for the question, please, and just answer the question.

THE WITNESS: Okay, sir.

BY MR. GRIFFIN:

Q You then point out that the Niagara Frontier War Housing, under the management of the Buffalo Municipal Housing Authority, included the following, LaSalle Courts, two hundred six units. LaSalle Courts is located where, Mr. Einach?

A I don't recall where it was located. It was in another part of Buffalo, I think the northern part.

Q Would it be in the northwestern part, around the LaSalle Quarry area?

MR. PANFIL: Your Honor, I submit that what Mr. Griffin is developing is in that report, the report speaks for itself.

THE COURT: It is something that is kept in the regular course of business and - -

MR. GRIFFIN: I'm not sure the locations are in there.

THE COURT: At this particular time, can you recall where LaSalle Courts were?

THE WITNESS: No, I don't.

MR. GRIFFIN: Perhaps I can check. Maybe there could be a stipulation.

MR. PANFIL: Was that temporary wartime housing that is now gone?

THE WITNESS: I'm not sure, it has been so long.

BY MR. GRIFFIN:

Q The next one was Langfield Homes, five hundred ninety-four units, what part of the City was that in?

A That is near Kenfield.

Q That is near Kenfield, so that is out in the Kensington section in a white community, is that correct?

A It was a white community.

Q We are speaking as of 1946.

A. Yes.

Q. As of the time they were constructed, they were obviously in a white community?

A. Yes.

Q. LaSalle was in a white community?

A. Correct, yes.

Q. Now, you then described Talbert Court and Carver Apartments as built under the Niagara Frontier War Housing Council and managed by the Buffalo MHA?

A. Correct.

Q. In other words, there were a lot of workers at the time of the war, in the 40's that needed housing, is that correct?

A. Correct, yes.

Q. So these additional facilities were made available, right?

A. Right.

Q. All right. Now, Carver and Talbert were constructed in that part of the City, to the west of Willert Park, generally in the William Street area, between Michigan and Jefferson, is that correct?

A. Yes, but I'm not sure it was to the west, I had to stop and think.

Q All right. At the time they were constructed in the 40's, they were constructed in predominantly black neighborhoods, were they not?

A Yes.

Q All right. You then describe two additional war projects outside of the city that were developed by the Buffalo Authority, namely, Tiorunda, fifteen hundred units, in Cheektowaga, and Sheridan Parkside, twelve hundred units, in the Town of Tonawanda, correct?

A Correct, yes.

Q They were developed by the Buffalo Municipal Housing Authority?

A Yes, they were. They were managed by them, incidentally, for quite a while, and turned over to other authorities in the area where they were.

Q Now, you then went on to point out that as of 1946, and I quote, "No Negroes have ever been assigned to any of the above mentioned projects, except the Willert Park extension, Talbert Court, and Carver Apartments," correct?

A Correct, yes.

Q That means that no Negroes had been assigned to Lakeview, Commodore Perry, LaSalle Courts, Langfield

Homes, Tiorunda or Sheridan Parkside?

A. Correct, yes.

Q. That also means, does it not, that no Negroes have been permitted to transfer from out of Willert Park, Carver or Talbert from the time they were opened through 1946, is that correct?

A. I won't say they were not permitted. I would have to document that more and refresh my recollection, but they didn't, and were not transferred.

Q. To the best of your recollection, there were no such transfers?

A. That is correct.

Q. There were transfers as between Commodore Perry and Kenfield and Lakeview and Langfield, were there not, during those years?

A. Yes, and subsequent to the report, there were other transfers, and the barrier was broken.

Q. That is at a subsequent date?

A. Yes.

Q. I am taking you through 1946 at the moment. Now, Mr. Einach, can you recall that originally Willert Park started out with one hundred seventy-three units, and then there were proposals sometime in the

* * *

MR. GRIFFIN: Thank you.

RECROSS EXAMINATION BY MR. GREGORY:

Q You don't have any statistics with reference to the last question Mr. Griffin asked you one way or the other?

A Correct.

Q You can't testify today, statistically, anyway, at that time what progress was made or was not made, is that correct?

A Not statistically.

MR. GREGORY: Okay, that's all.

(Witness excused.)

* * * * * * * * * * *

MR. GRIFFIN: I have one last witness, Mr. Service.

CLEON O. SERVICE, called as a witness on behalf of the Plaintiffs, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GRIFFIN:

Q Mr. Service, are you engaged in the business of real estate?

A Yes, I am.

Q What is the nature of your work?

A I am a realtor since the early 1930's. I specialize in residential real estate.

Q And have you been engaged in that business as a realtor, specializing in residential real estate, since the 30's in the City of Buffalo?

A That is correct.

Q You have had, among your prospects and clientele those that you have bought and sold for, a large number of blacks, is that correct, over the years?

A That is true.

MR. GREGORY: May it please the Court, I am going to offer an objection as to this questioning on the same ground that I offered the objection with respect to Mr. Einach, based on the line of decisions emanating from the Detroit case.

THE COURT: Your objection is noted.

I want to assure you that when the record is closed here, I certainly will give you an opportunity to present argument to me about why we should not consider it.

MR. GREGORY: Thank you.

BY MR. GRIFFIN:

Q Mr. Service, you were just present in the courtroom when the last witness, Mr. Einach, testified the relative to the situation in the municipal housing facilities from the 30's through 1946, is that correct?

A Yes, I was.

Q Were you familiar with any efforts to have additional public housing for citizens in the Willert Park area who needed additional housing?

A I was very close to the group that was instrumental in getting Willert Park placed in the first place. My father was one of the men immediately involved in the community, in a group that was instrumental in having Willert Park established. Their efforts included the attempt to find a location other than where they finally located Willert Park on William Street, efforts to get a location - - there were good locations at that time in the City - - they had one, especially one I remember, the organization - - they were working with a taxpayers group. I was acting as secretary - - was present at most of the meetings, and they had an east Buffalo site that they tried to get approved by the Federal Housing Authority, and it was rejected because the City wouldn't - - Well, as I understand it, there were citizen groups in the area, spearheaded by the Catholic Church officials, who killed the opportunity to locate Willert Park - - what would have been Willert Park there.

Q Can you tell us approximately when that was?

MR. PANFIL: Just for the record, may I record an objection as to the competency and relevancy of this witness.

THE COURT: Overruled.

THE WITNESS: This was in the early 30's.

THE COURT: The east Buffalo site, do you remember what street?

THE WITNESS: I don't recall, Judge.

THE COURT: You can't remember the street?

THE WITNESS: No, but it was east of Fillmore, I believe.

BY MR. GRIFFIN:

Q And was there then at some later date an effort to have additional - - Strike that. At some later date, was Willert Park extension constructed?

A Yes.

Q Can you tell us when that occurred, approximately?

A I don't remember the date. I know it was some years ago, after the first project was completed they needed additional space.

Q Sometime perhaps in the early 40's?

A I would think that would be close.

Q Was there opposition by members of the black community to locating - - to adding on to Willert Park?

A Very definitely.

Q What was the basis of that objection?

A They found that there was too much of a concentration of black families in the area, which was beginning to deteriorate. It offered poor residential facilities, the school was overcrowded, and many of the other facilities were very poor. They wanted to find a residential location to put the new project in.

Q And were there proposals to locate that additional housing in a part of the City other than the Willert Park neighborhood?

A Yes.

Q Would you tell us some of those places?

A I wasn't involved directly in that action. I was aware of what was going on, but I don't remember exactly the location.

Q I direct your attention to Exhibit 215, which is a newspaper article of August 14, 1941, entitled "Stop Plans for Negro Housing. Eleven Groups Declare South Buffalo is United Against Okell Street Site. Mass Protest Will Be Held." Does that refresh your recollection?

A Yes, I do remember the opposition they ran into in trying to find a location.

Q Was there, under discussion, a site known as Okell Street in South Buffalo, a predominantly white area?

A I remember it was a South Buffalo site. I don't remember the name Okell. I can't tie in with it particularly.

Q And was one of the community leaders of the neighborhood that would be affected quoted in Exhibit 215 as follows: "The Okell Street project threatens to destroy the work of forty years to build up the South Park District. The right to protect our homes is as sacred as the right to defend our lives. The citizens of South Park District to a man protest and will not permit this injustice."

A What was the question directed at?

Q Do I accurately quote a statement of one of the - -

A Yes.

Q - - leaders of the - -

A That is the way it reads.

Q - - potentially affected community?

A Yes.

Q Now, do you have any familiarity with the practices after 1946 of the Municipal Housing Authority relative to the assignment of blacks?

A Yes, I have.

Q And what is your familiarity?

A I am vice-president and a member of the Executive Committee of HOME, who became involved in investigating the practice of the Municipal Housing Authority, and it wasn't until 1970 that we actually were able to sit down with them and work out what we felt was the beginning of a satisfactory resolution of their practices of discrimination and assignment and refusal to transfer blacks from the predominantly black projects at that time. But after a good deal of pressure brought on the Housing Authority, we finally worked out an agreement which we felt was satisfactory. We are still policing, we are still not entirely happy with it.

Q You say you had negotiations on behalf of private citizen groups concerned about discrimination in public housing, you had negotiations sometime in 1970?

A. That is right.

Q Mr. Service, you stated you had negotiations in 1970 with the MHA relative to the condition in the Buffalo Public Housing Authority facilities, what was the practice that existed on and prior to 1970 that was the subject of your discussion with the MHA?

A. Well, the practices were the tendencies to assign blacks to a great extent, not entirely because due to some observations of their activities, they put blacks occasionally elsewhere, but a study of the statistics of the housing - - people living in the housing project - - indicated it was obvious that they were putting all blacks or the majority of blacks into all black projects. They had a policy never to make transfers. Once you went into a black project, you stayed. If a vacancy became available in another project, you were not allowed to transfer.

Q Now, just one more question in the field of public housing. I direct your attention to Exhibit 222, which is a copy of a newspaper article of March 4, 1942, entitled: "Housing Plan Abandonment By U. S. Likely. Eastside Residents Voice Strong Protest." Do you recall that there was a policy to locate in the Eagle-Fillmore site, then a predominantly white neighborhood, the housing facility that eventually was constructed at the Willert Park site?

A Yes, that is correct. That was another site that we attempted to place a project in, an expansion.

Q The first sentence of Exhibit 222 states: In the face of strong protests by irate residents of the section, the United States Housing Authority was reported last night as prepared to abandon the Eagle-Fillmore site for the proposed Negro housing project.' Is that correct?

A. That is correct.

Q. Was it true that it became identified in the minds of the community and in the press as a Negro housing project?

A. Yes.

Q. Now, following the war, and the movement into the suburbs, Mr. Service, and the construction of developments in areas such as Niagara Falls Boulevard, Lincoln Park, Town of Tonawanda, Amherst, would you tell us whether you made any effort to have your clientele - - or to show homes to potential customers of yours in those areas?

A. Yes, when I had people who wanted to find a home in other areas than what was the normal pattern for the black families, I attempted to fulfill their requirements, and there was sort of a lonely search trying to find a listing that they could - - were allowed to buy. The practice in those days was if you wanted to buy a house outside of the black area, you had to have a party to buy it for you and - - if you could get a look at it, maybe you would have to buy it blind, you could not look at it yourself and buy it in the normal fashion.

Q Sometime in the 40's or 50's, or whenever it was, did you have conversation with certain developers relative to the possibility of homes being sold to blacks?

A Yes. I tried a number of developers who advertised that they had property for sale, who were dealing with other real estate brokers who refused to deal with me.

Q Did any of these conversations take place with subdivision developers?

A Yes, that is correct.

Q And can you tell us approximately when this occurred?

A This was in the 50's and early 60's. Over a period of time, I tried - - kept trying over a period of time.

Q What was the response that you were met with?

A The broker said they could not either morally or ethically permit me to sell black families into an all white community. At that time, the ethics of the real estate profession didn't permit what they called the introduction of - - what is the term --

I forgot the phrase.

THE COURT: You mean you had to know who the buyer was, was that the attitude?

THE WITNESS: No. They couldn't be a different ethnic or racial background from the people that presently lived there.

THE COURT: Where were these areas that we are talking about now?

THE WITNESS: Well, many. I remember specifically one attempt to get one of the Pierce and Pierce subdivisions and - -

THE COURT: Where was that located?

THE WITNESS: Off Niagara Falls Boulevard, beyond Sheridan Drive.

THE COURT: In what township?

THE WITNESS: Town of Tonawanda.

BY MR. GRIFFIN:

Q Was the phrased used homogenous groups or something of that nature?

A The phrase introduction of different - - not homogenous - -

Q Was that phrase even used by the FHA personnel in the

40's?

A Yes, that was a generally accepted concept in the real estate business at that time.

Q Now, where is the Hamlin Park District located in the City of Buffalo?

A Hamlin Park lies between Jefferson and Humboldt Parkway, just south of Main.

Q And does it include the area southeast of Main and Kensington?

A Yes, that is correct.

Q Now, after the war and in the early 50's was that a predominantly white neighborhood?

A Yes, it was.

Q And were you able to show homes in that area at that time?

A Well, that was an area that was almost entirely white and gradually, blacks began to purchase homes in the area. At the beginning, it was very difficult, most of the homeowners wouldn't listen or show their houses to the blacks. As the change began to take place, of course, it became more or less an open area that anybody could buy or sell.

Q Was there any major construction project that affected that area, that related to any change in whether whites would sell to blacks?

A. The Kensington Project accelerated the whole process, along with the Ellicott Redevelopment.

THE COURT: You said Kensington, you mean the - -

THE WITNESS: Thruway.

THE COURT: The Expressway?

THE WITNESS: Yes. It did two things, uprooted lots of people who had to have homes and were pressing to get into the area, and it made this area less desirable with the Freeway going through.

THE COURT: When you say Ellicott Project, could you explain that on the record?

THE WITNESS: This is the Urban Renewal area designated by Buffalo, running from William to Swan and from Jefferson to Michigan.

THE COURT: What happened there?

THE WITNESS: There, the City condemned the entire area and purchased the properties and demolished the homes.

BY MR. GRIFFIN:

Q That was approximately when?

A That was in the 50's and running - - mainly the 50's.

Q After those events occurred, was there then a change relative to the ability to show homes in that area?

A Yes, that is correct.

Q Did you say that the neighborhood was less desirable and dislocated many whites from their homes?

A That is correct.

Q Now, when was Multiple Listing introduced into this vicinity?

A I believe it was about 1959. 1953 or 1959.

Q What is Multiple Listing?

A It is a cooperative listing system under the sponsorship of the Greater Buffalo Board of Realtors, in which all brokers contribute all their residential listings, exclusive listings to the system, and then they are distributed to all the members of the system.

Q What was the reaction of the Buffalo Board of Realtors at the time Multiple Listing came in relative to whether black realtors could participate?

A Well, under the system, any broker who was a member of the Board could become a member and therefore, would have the right to use the system. That then created a fear, particularly by the suburban real estate brokers, that it would mean an inundation of the suburban area by black people, because the listings would be available to them, and they dreaded the fact that many would probably buy - - since they could not buy directly because the laws of the State didn't prohibit people from denying a person the right to buy a home because of his color, therefore, they felt it was possible the blacks could buy with the help of the black real estate broker one way or the other, and, therefore, the threat by suburban real estate brokers to break out of the system and to form a separate board, which they did.

Q You say a separate board was formed?

A Suburban Real Estate Board.

Q Was this particular concern and fear on the part of the realtors the subject of discussion at any meeting?

A Yes. When they faced this problem, the Executive Board - - the Executive Committee feared that the whole system would not be endorsed by the brokers and might fall by the wayside, and they felt it was a good system, they had spent quite a few years studying it, and they did not want it to die, and they called in the black brokers presently on the Board, maybe six of us - -

Q Now, approximately what year was this?

A This was 1958, I believe.

Q You say all the black brokers were called in?

A Yes, in a meeting at the Park Lane.

Q This was a meeting at the Park Lane Restaurant, is that correct?

A That is right.

Q And what was the subject of discussion and the resolution?

A They wanted to work out some way that they could avoid the split in the Board with the new ML System, and they - - since ostensibly black brokers couldn't sell blacks, the terms was that we would not sell anybody. They felt that since we would have access, we could at least show the white families, whose homes we sold to blacks, a home in turn, and they felt any incident of a black showing up in all white areas would create a furor, and they wanted to avoid it, in order to get the system on its feet and get well established, and they asked us to agree not to show any homes in white areas. If we had a family and they were talking strictly about white families, a white family who wanted to see a home that we were servicing, they asked that we call the broker, and the listing broker would be a white broker in the white area, and he would show for us, free of charge, do everything to make a sale for us, we wouldn't have to come out, they would take care of the whole sale. This is the kind of concession they wanted to make to us in order to make the system work.

Q Was that practice followed for a number of years?

A. Yes, it was.

Q Does that mean that if you sold - - First of all, did you say that in terms of showing houses in these various white communities to blacks, that was out of the question, as of that time?

A. Yes.

Q Now, we are talking about a white seeking to buy in a white neighborhood, but he or she happens to be represented by a black realtor, is that correct?

A That is correct.

Q I assume that on some occasions, where perhaps you handled the sale, let us say, of a home on Humboldt Parkway for a white who was moving to the Town of Tonawanda, is that an example of when this would come into play?

A That is correct.

Q And under this policy that was adopted at this 1958 meeting at the Park Lane, you, as a black realtor, and the other black realtors, couldn't show the house under multiple listing to your white customer from the City, is that correct?

A That is correct.

Q You would have to make arrangements to have a white broker show a white a particular premises in a white community, is that correct?

A That is right.

Q How long did that go on?

A Well, for a few years, until the system got well established. We just - - we did it really as an accommodation. We felt the system should live also, it had real potential at some time for us, and we wanted to see that it continued to exist.

Q Did it continue into the 60's?

A Yes.

THE COURT: Did this board include suburban realtors as well as realtors in the City of Buffalo?

THE WITNESS: Yes, it did. It is a County-wide system.

THE COURT: It is a County-wide system, but there were some brokers that split off and formed a suburban real estate - -

THE WITNESS: I think there were two split-offs, who formed their own boards because of this, and they specifically advertised in all their advertising, 'We are not members of the ML System,' in order to let people know they were not cooperating with us.

BY MR. GRIFFIN:

Q Were any black realtors permitted to become members of the Suburban Board?

A No, not at all.

Q Mr. Service, are you familiar with FHA 235 Housing?

A Yes, I am.

Q What is that?

A It is a subsidy program, an FHA program in which families within certain limited incomes are given an interest subsidy on the purchase of homes, on the mortgage payments, over the term of the mortgate.

Q And when did that program start?

A 1968, the Housing Act of 1968, I believe it was.

Q Has that program, based upon your experience, had any adverse effect on the ability of blacks to move into white communities?

A Adverse effect?

Q Yes.

A Not adverse.

MR. GRIFFIN: Your Honor, I wonder if I could have a minute to check a couple of things?

THE COURT: Why don't we break until Tuesday. Mr. Service, I would like to finish you up this afternoon, but we have been at it a long time here, and there are some other things that I have to do. I think maybe it would be best if we took a break. On Tuesday, you are going to have Mr. Nyquist at 10:00 o'clock?

MR. GRIFFIN: That is correct, your Honor.

THE COURT: Later in the day, maybe in the afternoon, we can have Mr. Service back.

MR. SCHWARTZ: That is fine. We don't anticipate very much with Mr. Nyquist.

MR. GRIFFIN: Perhaps Mr. Service could return about 11:30.

THE COURT: All right.

(Thereupon, the court was in recess at 4:45 p.m.)

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of paper which will require a different label, there is no objection to the admission of Exhibit 37, - I am sorry, 34, 36, 37, 122, 123, 124 and 125. I will repeat those, 34, 36, 37, 122, 123, 124 and 125.

THE COURT: They may be marked in evidence.

(Plaintiffs' Exhibits numbered 34, 36, 37, 122, 123, 124, 125, respectively, received in evidence.)

THE ~~COURT~~: In addition, your Honor, for your own witness list, we have marked two more exhibits this morning prior to this convening of court and Mr. Walsh has the identification of those too. Dr. Ewald Nyquist, please.

EWALD B. NYQUIST (R.F.D. #2, Selkirk, New York), a witness called by and in behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. SCHWARTZ:

MR. PANFIL: May it please the Court prior to the testimony offered by Dr. Nyquist I would like to clarify his position. He is a party defendant being called by the plaintiff. Under normal circumstances, a witness called by the plaintiffs will testify and give proof that binds the plaintiff. Your Honor, I move the testimony given by Dr. Nyquist today will bind the plaintiffs.

MR. SCHWARTZ: Well, your Honor, normally, when one calls a party Rule 43 of the Federal Rules of Civil procedure, I think indicates that one is not bound by that when one calls the adverse party.

THE COURT: We will listen to argument later on. Right now, we will listen to testimony.

BY MR. SCHWARTZ:

Q Dr. Nyquist, will you state for us your present position?

A Yes. I am Commissioner of Education, State of New York.

Q How long have you held that position?

A Since November 19, 1969.

Q Who was your predecessor in office?

A James E. Allen, Jr.

Q Do you know when he became Commissioner?

A Not the exact date, but it was 1955.

Q Thank you. Now, would you tell us, generally, what your responsibilities and duties are as Commissioner of Education of the State of New York?

A I have two functions. One is the Chief Executive Officer under the Board of Regents as head of the State Education Department and I have an administrative capacity there. I also have a quasi judicial capacity. I can hear educational grievances based on educational matters anywhere in the State at the elementary and secondary level and also anything arising in the City University of New York.

Q Over what kinds of subject matter do you have jurisdiction, what do you deal with?

A Well, we have regulatory responsibilies based on law, obviously, with respect to supervision of schools, accreditation of schools and colleges, public libraries, museums. We have developmental responsibilities, coming up with programs funded by the Federal Government or by the State. We provide technical assistance to local school districts.

Q Technical assistance with respect to what kinds of matters?

A Anything; better school business management, curricular development, custodial functions, orientation of new School Board members, a whole host of things.

Q Now, what powers and responsibilities do you have specifically over matters of racial balance in the schools?

MR. PANFIL: Objection, your Honor. I don't mind the witness testifying as a layman. He is not a lawyer. With regard to his general duties and responsibilities. However, when you get to specifics, we have the Education Law of the State of New York, Sections 301 and 305 which describe the powers of the Commissioner of Education and I submit they speak for themselves.

THE COURT: It may be also important to know what Mr. Nyquist, - how he looks upon these obligations, so I will overrule your objection, and in all these matters, Mr. Panfil, we will listen to your argument later on as to the relevancy or materiality of any of this material. Overruled.

THE WITNESS: Do you want to repeat your question now?

BY MR. SCHWARTZ:

Q Yes. Specifically, over the matter of racial balance in schools, would you give us your conception of what you consider to be your powers and responsibilities?

A Well, the Board of Regents has adopted a policy of, - in favor of, - strongly in favor of racial integration and under that policy in the appeals that have been brought to the Commissioner of Education, I think it is under Section 310 of the Educational Law I have heard those appeals and the Commissioner has the power as sustained by, - in the courts of the State and to the Supreme Court to order desegregation of schools.

Q Is that Regents policy reflected in Exhibit 27 which I show you at this time?

A Yes, but there are later ones.

Q Are they essentially the same?

A And stronger along the way.

Q Stronger?

A By virtue of issues which arose between '69 and '72.

Q Now, when was this policy first announced by the Regents, if you recall?

A Well, there was a general statement, a foundational statement somewhere in '60 and '61, as I remember.

Q Now, what is your relationship to the Regents policy and to the Regents?

A I am appointed by the Board of Regents and serve at their pleasure. I have no contract. I serve at their pleasure.

Q And it is your job to implement their policies, is that correct?

A Yes, indeed.

Q Now, can you tell us what kinds of educational goals the Regents policies sought to achieve by adopting their various policies on integration?

A Better education, better understanding between the races and minority groups and majority groups.

Q Can you tell us - -

A Justice.

Q I am sorry.

A Justice.

Q Can you tell us what you see specifically as the link between racially integrated schools and adequate education and quality education?

A Well, I think it does lead, - I think racial integration does lead to improved education for minority groups that have been disadvantaged in schools that they attend. Not all schools that they attend, but certainly some of them that are segregated. I think it leads to increased understanding between the races if schools are conducted well and the way is paved for racial integration and if it involves members of the community, parents and the students themselves in developing a racial integration program.

Q Now, are you familiar with the report by the University of the State of New York and the Education Department, Division of Research to the Board of Regents entitled "Racial and Social Class Isolation in the Schools"?

A Yes, I am.

Q Can you tell us - -

THE COURT: This is exhibit - -

BY MR. SCHWARTZ:

Q I am sorry, Exhibit 28 for identification. Could you tell us, roughly, what the conclusions of this report were, if you remember?

A Well, the general conclusion from that massive report is that racial integration is beneficial.

Q And what about racial and social class isolation?

A It was disadvantageous to both blacks and whites.

Q Do you endorse the conclusions of this report?

A Absolutely.

MR. SCHWARTZ: We would like to offer it into admission at this time.

MR. PANFIL: No objection by either counsel here, your Honor.

THE COURT: All right, mark the exhibit in evidence.

MR. SCHWARTZ: Exhibit 28.

(Plaintiffs' Exhibit 28 received in evidence.)

BY MR. SCHWARTZ:

Q Now, did there come a time when the Commissioner of Education, the office of the Commissioner of Education became aware of the racial balance of the schools in Buffalo?

A Yes. At the time, the first appeal was made sometime in the 60's.

Q I see.

A To Commissioner Allen, then Commissioner Allen.

Q To then Commissioner Allen?

A Yes.

Q Now, if I told you that appeal was filed in August, '64, would you have any reason to doubt that?

A No, '64 or '5, I just don't remember the exact year.

Q Now, between that date and the present, have there been frequent communications between Buffalo, the Buffalo Board and Administration on the one hand and the Commissioner's office on the other?

A Since '64?

Q Yes.

A Oh, yes.

MR. SCHWARTZ: Now, just to get it out of the way and be able to refer to it, let me offer at this time, Plaintiffs' 282 which is Exhibit 3 to the interrogatories responded to by Commissioner Nyquist and which have been marked this morning. It consists of some twenty-seven items of communication between the Buffalo Board on the one hand and Commissioner Nyquist's office, and was supplied by Dr. Nyquist. I think Mr. Panfil has a comment.

MR. PANFIL: Yes. Is that the entire sheaf of papers that was returned as Exhibit 3 of the deposition?

MR. SCHWARTZ: Yes, it was.

MR. PANFIL: There is nothing excluded?

MR. SCHWARTZ: As far as I know.

MR. PANFIL: Because my numerical sequence goes up into the forties and you said 28.

MR. SCHWARTZ: No. It goes into the forties, but it isn't complete. Mine goes into the forties also. Here is 21.

MR. PANFIL: We can check that later, your Honor. If Mr. Schwartz doesn't mind, we will make sure that everything that was returned is with the exhibit.

THE COURT: I appreciate that.

MR. SCHWARTZ: Yes.

(Plaintiffs' Exhibit Number 282 received in evidence.)

MR. SCHWARTZ: If, your Honor, that is not a complete set for some reason or another, we can get a complete set and introduce that instead.

THE WITNESS: I think I have one back there I will give you later.

BY MR. SCHWARTZ:

Q Thank you. Now, Dr. Nyquist, what was the first statement by the Commissioner of the, - with respect to the situation in Buffalo, do you recall?

A. No, I do not.

Q Well, let me rephrase the question then. In February of 1965 in the matter of Yerby Dixon, the Commissioner ordered the Buffalo School Board to take certain steps with respect to integrating the schools, is that correct?

A. As I remember the Yerby Dixon case decision, yes.

Q Now, are you familiar with the sequence of events between then and now, the chronology and so on, because I would like to take you through that.

A. The past before 1969 is a little blurred in my memory, but I know very well what transpired during my term.

Q Dr. Allen was the Commissioner at the time and you were his assistant?

A. I was Executive Deputy Commissioner.

Q Which is the second position in the Commissioner's office?

A. Yes.

Q Now, the Board responded, did it not, with respect to your, - with respect to Commissioner Allen's directive with a proposal of one kind or another, do you recall that?

A. I can't remember precisely what the response was.

Q. Well, do you recall - -

A. Oh, yes. It was a middle school concept, as I remember.

Q. At this time?

A. I am not precisely sure.

THE COURT: I think it would make a much clearer record, Mr. Schwartz, and certainly we can understand it would be most difficult for the Commissioner to recall all these events. Why don't you show to him any of these letters or correspondence that you want so he knows definitely what occurred.

THE WITNESS: I think the interrogatories and other exhibits will give you a precise schedule.

MR. SCHWARTZ: Well, they do to some extent.

THE COURT: The thing is after you conclude, perhaps you ought to ask him some additional questions.

MR. SCHWARTZ: Yes.

THE COURT: But it seems to me best that if the Commissioner had in mind and in hand all of the papers you wanted to ask him about.

BY MR. SCHWARTZ:

Q Unfortunately, we don't have the submission by the Board. What we have is Dr. Nyquist's response to it. Let me simply put in evidence your response. Let me just read into the, - for the purposes of the record, this is a letter dated October 8, 1965, Plaintiffs' Exhibit for identification 77. Does that look like the letter that you submitted in response to the interrogatories from Commissioner Allen?

A Yes. This one isn't signed, but it certainly looks like it, the response that came from Mr. Allen.

Q And you will note that the letter says, quote, " I find a report submitted by the Board for progressive elimination of racial imbalance disappointing. It fails to come to grips realistically with the problem and to present a long range solution or to identify the barriers which must be overcome in order to reach a solution. I do not feel that the Board's report deals in sufficient depth with the large and complex problems facing the school system", and it goes on from there and talks about a meeting that was held. You recall or are familiar with this letter?

MR. PANFIL: May it please the Court, that is a letter from Dr. Allen to a Mr. Nitkowski. I don't think this witness should be testifying - -

THE COURT: It is a record kept in the regular course of business, I assume, of the office, so I will overrule the objection.

MR. PANFIL: On that score, it is already in evidence. I thought that was part of Exhibit 3 the way I have it.

THE COURT: Mr. Schwartz - -

MR. SCHWARTZ: Yes.

THE COURT: There are two things. One is all of these letters are in. They are part of the record. It appeared to me that what you want to do is you want to show some of this material to Commissioner Nyquist so that he can refresh his memory so that when you get finished with showing him the history of the correspondence, then you would like to ask him some additional questions.

MR. SCHWARTZ: The problem is, your Honor, I am afraid, is that in preparing this, the particular interrogatory response was taken apart and it turns out, unknown to me, actually, that specific pages of that response which explains the difference in pagination between what Mr. Panfil has and what I just submitted before, specific items from this were marked separately and so I am trying to put the two together here, not knowing what already is in evidence through Exhibit 3. I guess all of this is in evidence, but I'm not just that sure.

MR. PANFIL: Your Honor, I will stipulate.

THE COURT: Is there any way you can gather all these letters together now?

MR. SCHWARTZ: Maybe we ought to take a ten minute break and then I will look at his as the model and then put it together and then it will all be in this one thing.

THE COURT: Otherwise, we are going to have a very confused record here going back and forth.

MR. SCHWARTZ: I am sorry about that, Dr. Nyquist, I am sorry.

THE COURT: We will be in recess.

(Recess taken at 10:30 a.m.)

* * * * * * * * * * * * *

PROCEEDINGS: After recess, 10:50 a.m.

APPEARANCES: As before noted.

EWALD B. NYQUIST, a witness called by and in behalf of the Plaintiffs, having been previously duly sworn, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION BY MR. SCHWARTZ (Resumed):

MR. SCHWARTZ: Thanks to Mr. Panfil's great help in this matter, I hope we have managed to put Humpty Dumpty together again on this and we can proceed.

MR. PANFIL: I can no longer prove which is his exhibit, because I have given him a lot of mine.

THE COURT: Very well.

BY MR. SCHWARTZ:

Q. A touching act of faith. Dr. Nyquist, I read to you before from your letter of October 8, - from Commissioner Allen's letter of October 8, 1965 and you were familiar with what was going on at that time, were you not?

A. Oh, I knew, yes, generally, yes; not every detail, certainly.

Q. And the policies that you were enforcing now are essentially the same as those that Dr. Allen was working with and implementing back in the middle 60's at the time of this correspondence, isn't that correct?

A. Yes, essentially the same.

Q Now, in the fall, - in the spring of, - Now, in November 1966, another plan was submitted and I show you a letter from Dr. Allen acknowledging that, a plan entitled "Recommendations for Making Further Progress", was submitted to the Board of Education by Superintendent Manch on November 2, '66 and approved by the Board November 10th. Do you recall? This is a document by Dr. Allen?

A I remember something coming in. Again, it is not signed.

MR. GREGORY: May it please the Court, may I have the date of that letter?

BY MR. SCHWARTZ:

Q November 10, 1966. Now, in June of 1967, Dr. Allen responded and I show you a letter dated June 7, 1967.

THE COURT: Can we have the exhibit number, please?

MR. SCHWARTZ: Well, it is all part of the same exhibit, your Honor. This is part of the interrogatories. They were unfortunately marked separately, but we have now agreed this is all part of the interrogatories, all part of that exhibit.

THE COURT: Let us have the date then.

BY MR. SCHWARTZ:

Q Yes, June 7, 1967, a letter from Dr. Allen to Mr. George Goodyear then the president of the Board of Education with a carbon copy to you which concludes by saying "Mr. Nyquist, the Deputy Commissioner, will consult with Superintendent Manch and arrange a date". If you look at this letter, this indicates disappointment, doesn't it, with the response of the Buffalo Board.

A The last paragraph on Page 1.

Q Could you read that for us?

A Sure. "The latest recommendations and accompanying materials submitted by the Board have been reviewed by the staff of the Department by me and I am sorry to say are found to be disappointing and unsatisfactory, lacking in specificity and devoid of any real evidence on the part of the Board to reduce significantly racial imbalance in the Buffalo School System", end of paragraph.

Q It was on that occasion he asked you to go to Buffalo to work with the Board?

A. Yes, as indicated in the letter.

Q Yes, as indicated in the letter. Now, you worked with the Buffalo Board for a while and then in January,'68 a plan was proposed. Do you recall that, the sixteen point plan?

A. Generally.

Q Okay. The stipulation indicates that the plan included, among other things, the following items, and that is stipulation, Paragraph 102, Page 31, that Southside Junior High School be converted into a middle school. Woodlawn, - there would be an effort to do something about Woodlawn and so on. It would deal with East High School, other middle schools would be built, educational parks would be planned and all of this was submitted to you in these documents, isn't that correct? A letter dated January 30, 1968 and a document entitled "Recommendations for Achieving Quality Integrated Education in the Buffalo Public Schools".

A. When you say submitted to me, you mean submitted to

Commissioner Allen?

Q I am sorry, submitted to your office with Dr. Allen.

A. Yes.

Q Do you note here, Dr. Nyquist, in this proposal's reference to staff, on Page 8 of the recommendations?

A. Do you mean about the black teachers?

Yes.

A. Sufficiency of black teachers?

Q Yes.

A. I know that was a question at the time.

Q It was. Let me read, at this time, what the School Board said about that. This is at the top of Page 8, "The State Education Department has called attention to the fact that a disproportionate number of Negro teachers are predominantly at Negro schools and that some schools have only a token representation of Negro teachers. We should continue our work toward a distribution of white and Negro teachers throughout our schools". This was in response, apparently, to something done by your department, something pointed out by your department, is that correct?

A. I just can't remember that.

Q Yes. Now, if you recall, the most significant part of this plan was the middle school concept, is that correct?

A. Yes. We used to call it that, the Middle School Plan.

Q Yes, the 4-4-4 Plan.

A. Yes.

Q And the essence of that is that integration would not be sought in the elementary schools, the K through 4 schools, but it would be sought in a 5 through 8 set of schools that was to be built, is that correct?

A. Yes, I think that's the idea.

Q Now, Dr. Allen required reports about the implementation of this, - periodic reports every six months or so, didn't he?

A. Periodic, I can't remember the time limit.

Q Well, the exhibit indicates some of these reports and then after about a year, - just one moment, Dr. Nyquist. I am looking for the key document. Now, you took office in 1969, Dr. Nyquist?

A. Yes, I think in my early testimony, I said November 19, 1969.

Q Oh, November, 1969, I see, and then you became directly involved with the implementation of the Buffalo School Plan at that point as Chief Executive Officer?

A Sometime after I became Commissioner, yes. I can't recall the exact time.

Q Now, in February of 1970, do you recall any efforts on your part in connection with the Williamsville District?

A I can remember, - was that a proposal, - did that involve a proposal to transport certain black students to the suburbs?

Q Yes, that's correct.

A Well, my involvement on that was just a statement I think I made at the time at a meeting here in Williamsville that I thought the Williamsville Board was very courageous and so was the superintendent and that was the extent of my involvement, as I remember it.

Q In other words, it wasn't terribly great?

A No. I supported it.

Q Yes. Now, between the spring of '69 and January '72, do you recall indicating to the Buffalo School Board your concern about the pace of integration and desegregation of the Buffalo Schools during that period? I ask because there are no documents in here indicating such concern.

A. Well, I just don't know. I do remember one thing that happened between, - just before I became Commissioner and extending for some time and that was that the State Legislature passed a law which prevented me from doing anything about racial integration.

Q. This was Chapter 342 of the laws of 1971?

A. Yes. I don't recall the number.

Q. Yes, the so-called Anti-Busing Amendment.

A. Right, yes.

Q. Did you consider that was a serious hindrance to your efforts?

A. Until it was considered unconstitutional by a Federal Court, yes.

Q. This Federal Court?

A. This one?

Q. Do you consider that it interfered with the pace of integration in the Buffalo Schools?

A. Well, I don't know what their thinking was. I would imagine it would have that effect, but I can't say that for sure.

Q But it interfered with your powers with respect to the Yerby Dixon orders, isn't that correct?

A. Taking the initiative of being aggressive about ordering racial integration in this and in other cases as well.

Q I see. That was declared unconstitutional in September, 1970, if you may recall?

A. I don't recall the date, but I know - -

Q It is in the document. Now, do you recall receiving a letter in December, 1971 from one of the plaintiffs in the case, Mr. Norman Goldfarb from the Citizens Council on Human Relations relating to the slow, - relating to the pace of integration in the Buffalo Schools?

A. I don't recall. I don't recall receiving it. I may well have.

Q I show you --

A. I recall something triggering off. I said there were a number of cases. We had a limited staff and I remember something triggered it off after that law was declared unconstitutional.

Q Yes. In other words, do you think it might have been this letter from Mr. Norman Goldfarb which is Exhibit 102 in evidence?

A. I would have to have more time than I have here. It could have been. I don't know.

THE COURT: We have had in this trial, Commissioner, prior testimony by Mr. Goldfarb. He testified that he mailed that letter to your office.

THE WITNESS: Yes. I am sure we have it in our files and exhibits.

BY MR. SCHWARTZ:

Q Now, that or something like it triggered your efforts again, I think is the way you put it?

A. Yes. It could have been that that did that. As I say again, there were four or five outstanding cases I was dealing with and I don't remember precisely what happened in each one.

Q And what did you do as a result of that triggering, as a result of your, - if you will, revived interest, what happened?

A. I may have asked for a report of progress. I don't recall exactly.

Q I see. Did you make any visits to Buffalo?

A I made at least one sometime and I can't recall precisely when it was, - '72.

Q I am told it was in '72 that you made the visit.

A To talk to the Board?

Q Yes, to talk to the Board.

A Yes.

Q Now, what kind of, - did you indicate to the Board your views on the pace of integration in Buffalo?

A Oh, I am sure I did.

Q Pardon?

A I am sure I did.

Q And what did you tell them?

A Well, I was concerned that we do something about it and that I would hope that they would be disposed to be cooperative in developing a plan that would be acceptable and would be invoked by them and which I could support as Commissioner. I think that was the general idea.

Q Now, did you indicate, - Did you write a letter of January 20, 1972, if you recall?

A I suppose I could have. I don't recall precisely.

Q I show you Plaintiffs' Exhibit, - well, actually, this is an exhibit that Mrs. Coon introduced, but it is the same as this one. It is the report submitted by your office in November, 1972?

A. Yes.

Q. To the Buffalo Board, at Page 24 of that report there is a statement, an, - the quotation of a statement which says as follows, Page 24 of that report, "I ask that you strengthen your efforts to develop a plan different from the one originally formulated as a consequence of the Yerby Dixon appeal. I do not suggest that eventual implementation of a 4-4-4 Plan be precluded but do strongly urge that an elimination of segregation in the early grades where integration is most easily achieved and most effective on the lives of children", and you concluded the letter by saying, "Please report to me by February 15, 1972 on your progress in complying with this request". Did you get what seemed to you a satisfactory response to this?

A. No, I don't think so.

Q. What was the nature of the response that you did, in fact, get? And this is the winter of 1972.

A. Well, you asked was it satisfactory and I said I didn't think it was. I don't recall precisely in what terms it was phrased.

Q Well, can you recall any of the things that were specifically said by any of the Board members?

A. Are you talking about the letter now?

Q No. I am talking about your conversations with them. Didn't you tell me you thought you had some conversations at this time?

A. Well, not all the Board members were anti-racial integration.

Q I see. Was a majority?

A. Oh, sure. Otherwise, we wouldn't be here.

Q That may very well be. Now, according to Page 26 of this report of November 11, 1972, which sets out a chronology of events, you apparently wrote to the Board a letter in which it says quote "Indicating his disappointment that the Board majority could not produce the desired segregation plan, the Commissioner wrote to the Board", and then there is a quotation indicating that you were directing members of your staff to work with them?

A. Yes.

Q Do you recall that?

A. Yes.

Q. And members of your staff worked with the Board about a half year, five or six months?

A. Several months.

Q. Yes.

A. Several months.

Q. And in November, 1972, they came up with the report that I have been referring to that is Exhibit, - This report of November 13, 1972 that is in evidence. Now, what response did you get to the submission of that report from the Buffalo Board?

A. Well, again it was unsatisfactory.

Q. Can you give us somewhat more details of the nature of that response?

A. No, I can't recall precisely.

Q. Well, did they, - did you get a response by letter from them? Did you get any formal communication from them at all that you recall?

A. I must have gotten something, but I don't recall precisely what it was. Maybe our records will show it.

Q. Well, we don't have any copy of any response.

A. I don't recall whether some Board member came down to see me or whether the Superintendent did. Whether the Superintendent did with a Board member or whether it was a letter or what.

Q But to your recollection, there is no written or specific oral response on behalf of the Board to that proposal of November, 1972?

A I just don't remember what the response was.

Q If there was such a response, written or otherwise,- particularly written, could you furnish that to us and we will submit it as part of the record of this case.

MR. PANFIL: Yes, we can. Can you give me that date again?

MR. SCHWARTZ: Well, it is anytime after November '72.

MR. PANFIL: In response to a letter?

MR. SCHWARTZ: No, in response to the submission of the plan of November '72.

MR. PANFIL: Your Honor, if it exists, we will supply it.

THE COURT: All right.

BY MR. SCHWARTZ:

Q Now, do you recall in January or late December, 1973 receiving a letter from a Mr. Arnold Gardner, then a member of the Board expressing concern about the pace of integration?

A. I remember such a letter. I can't recall the precise time.

Q. Yes, and you will note that a letter went back from Mr. Sheldon which is now Exhibit 269, indicating, quote "I am truly sorry that we have not been able to do something more constructive in a cooperative mode, but fully understand the mood of the day and problems associated with it. Nevertheless, in the long run, all of these things will lead to a better educational program for all children". Mr. Sheldon was speaking or writing on your behalf at that time, wasn't he?

A. Yes, he always does.

Q. He always does. Then I show you another letter of October 3, 1973 addressed to you by Mr. Gardner, Exhibit 265, and you will note - -

A. What is the date on that?

Q. October 3, 1973.

A. Okay.

Q. And you will notice he said to you "All in all, I suppose my feeling is one of continued frustration, but not yet quite resigned to frustration. After all, Joe, you started much of the turmoil in Buffalo and rightly so", and then he goes on, and you responded to him in Exhibit 266 on October 11, 1973, isn't that correct?

A. Yes.

Q. And in that letter, you stated "I was as disappointed as you at our inability to get the Board to consider a reasonable approach to integrating the schools. In my opinion, there are several steps including the draft plan which could have been taken as first stages and would have provided good platforms for the Board and citizenry to go forward with confidence". That draft plan refers to the November '72 plan, isn't that correct?

A. It's the one that we, - I am not sure what the reference is there. There was one that we thought was approveable and we thought could be phased in. I think that is what I was probably referring to.

Q. Yes. Now, Dr. Nyquist, have you seen any progress since the date of January '72 when, as you put it, the interest of the Commissioner was triggered again, by the Buffalo School Board.

A. I would have to say without thinking too hard or having enough time to think that there have been, perhaps, maybe minor decisions, but very minor. I see no real substantive change.

Q Okay. Now, have you had any communications of any kind with the newly elected School Board in the City of Buffalo?

A. Yes.

Q Can you tell us the substance of those conversations? I am sorry, strike the question. Were those questions related to integration of the schools?

A. I wish you had left the other question in.

Q I know that.

A. No.

Q No. You have had conversations with them about other matters, however?

A. Yes.

Q Other matters not directly pertinent to this lawsuit?

A. Not relevant to racial integration, no.

Q Now, Dr. Nyquist, don't the actions of the Buffalo School Board in your judgment clearly and unequivocally violate the Regents policy?

A. Yes.

Q. Hasn't this, in effect, been willful defiance of your instructions?

A. Oh, I think so. I am sure.

Q. Now, you have some sanctions, haven't you, available - -

A. Yes.

Q. To you when there is such willful defiance?

A. Yes.

Q. What are those sanctions, if you will tell us?

A. They are based on law.

Q. Yes.

A. One, removal of Board members following due process, are, of course, hearings and all that, and the second is to withhold State aid.

Q. None of those, - neither of those sanctions have been ascerted in this case, in this matter of the Buffalo School Board?

A. Neither one.

Q. Now, Dr. Nyquist, in the past, your office has approved site selection for certain schools, such as the Woodlawn Junior High School, the new addition to School 39; are you familiar with that?

A. Are you speaking with reference to Woodlawn and 39 in

Buffalo?

A. Yes. I am sorry. Yes.

Q. We haven't had anything to do with site selection in Buffalo, I don't think.

Q. Well, aren't you supposed to approve the construction of new schools? Isn't that approval necessary?

A. Would you like to give me, - do you want me to answer what the situation is?

Q. Yes, yes.

A. The,- there have been some changes over a period of time but the, - we don't have any approval power with respect to New York City.

Q. But you do have with respect to Buffalo?

A. No.

Q. Oh.

A. Well, let me answer fully here.

Q. Sure.

A. Aside from the New York City, - let's leave that out, - but the big four cities, Buffalo, Rochester, Syracuse and I guess Yonkers now, which is not a big city anymore, we have approval powers, but they have not been exercised. They are permissive, as I understand from my counsel. The reason they are permissive and we haven't exercised them in those four cities is because we have had a lot to do in a very expanding educational system over the years and also, - well, that is it. We do have approval powers and exercise them over all other school districts. I think that is, on advice of my counsel, the situation.

Q. I am sorry, did you include Buffalo in those that you don't exercise power?

A. That we haven't exercised. We do have the power, as I understand from my counsel but haven't exercised it over a period of years. I don't know why. I think it is just they are big cities and we have a limited staff and there is a lot to do in an expanding period over the ones where we do exercise it.

Q. But you do have the power to exercise site approval and construction approval?

A. Yes.

Q. And you can veto it?

A. And I don't know how long we have had it with respect to the big four cities, I would have to have the law examined on that, but I know we have had it and I know we haven't exercised it as long as we have had it.

Q Is it likely that you have had it less than the last fifteen years?

A I don't know. I can't answer the question.

Q Okay. Let me close with just one last question, Dr. Nyquist. Given the realities of the situation, is it likely - -

A What do you mean by "realities of the situation"?

Q All right. Strike that. Let me say is it likely, in your judgment, that the Buffalo School Board, the Buffalo Schools can be desegregated without a Court order?

A Do you mean a Federal Court order or a State Court order?

Q An order of the Court, either one.

A You are not including me?

Q No, I am not including an order from you.

A Then my answer is that I don't think you can achieve racial desegregation here in Buffalo without an order from the Commissioner or from the Court. You know, who have power to do that.

Q Well, there is an order from the Commissioner, isn't there, Dr. Nyquist, an order entered almost ten years ago, isn't that correct?

A. Outstanding, yes, but in following due process what we had in mind and what I was about to do before I had open heartsurgery last April was have a show cause hearing because of the lapse of time and I had open heart surgery and the order was ready to go and sign and I was in the hospital and recovery and it took a long time.

Q By a show cause order, you mean an order by the Court?

A. No, in my own.

Q My own chambers, yes, a hearing because of the lapse of time referred to, and I just wanted to be sure for the legal record and to follow due process to find out, you know, formally, was it "yes" or "no", and what we are going to do and what progress had been.

Q Was there any doubt in your mind as to whether it would be "yes" or "no" with respect to what the Buffalo School Board would do?

A. Well, since I have a quasi judicial capacity, I don't think I ought to answer that question and second guess those who would have appeared.

MR. SCHWARTZ: No further questions. Thank you, Dr. Nyquist.

CROSS EXAMINATION BY MR. PANFIL:

Q Dr. Nyquist, do you, at the present time, have in your mind a plan, one that you were following or would continue to follow with regard to the problem in Buffalo, the racial segregation in the schools?

A. Yes, I just referred to it, if you are referring to a show cause order which was in final preparation, I remember my counsel saying it was ready to go the next week or something.

Q I see. Well, have you been following this plan for some time with different options, depending upon the contingencies, have you not?

A. I am not sure what you are referring to there. This has taken a long time. There is no question about it. That is what this hearing is all about, I guess, or part of it. And there have been a series of events. Is this what you are referring to?

Q Yes, this is what I am referring to.

A. Beginning since I became Commissioner and I think in the preceding questions, we brought that out. The law was passed just before I became Commissioner which eventually was declared unconstitutional which prevented me from doing anything about racial integration really, except encouraging it. I can do that, and when that was cleared up, I decided to take a little different tact from my predecessor and that is to involve the community and try by persuasion to get a plan developed. It is a much better, sounder way of going about it and that took time. It was, - and I also wanted to build, let the Board and the community have, - the Board, really, because they are in charge, give them every possible opportunity so that looking towards in the kind of political climate we had at that time, including Mr. Nixon's stand on busing, looking toward the time that if an appeal were taken by the Board, I would have a sound, reasonable, painstaking legal record of what had been done. Just about that time, my Director of Division of Intercultural Relations who does this work had a heart attack and died and that also held us up and we were short of staff, and then in '73, bringing it down to that time, we had a couple of new Regents on the Board and they wanted to be involved in the proceedings and to see if they couldn't help and I think here in Buffalo that was the case, and that brings down, that took some more time. That brings it down to April of '74 when I had already issued three show cause orders in three other communities and two more to go and one of them was Buffalo and I had a heart attack and I didn't recover fully from that until July.

Q Is that July '74?

A Yes, this year. By that time, on advice of counsel and my Deputy Commissioner and my own conviction, I didn't think that we should issue an order for, - you know, opening of school coming the first of September and so that we waited then for the Supreme Court decision to see if the Detroit case would help us any and it didn't and then along about that time, finally the Regents themselves raised the question, a couple of the Regents, should they not review their racial integration policy. We have had the exhibits here and I expect them and because I was not going to issue a final order if that was the outcome of a show cause order on a hearing, because I wouldnt issue it for the opening of school in

'74, I just decided to wait and the Regents are going to come out with their new policy and in a sense of after reconsidering it, they may reaffirm it. I don't know what they will do. I am hopeful they will reaffirm it. That will come at the end of October. I think that's the whole story covering the five years I have been Commissioner.

Q Could you explain, Dr. Nyquist, the sequence of events which would follow the issuance of a show cause order?

A I would have a hearing within, - because there is already a lot of time spent on this, - I would issue an eventual show cause order, presumably. Now, let's assume that the Regents' policy is reaffirmed as to what they have done in the past on racial integration, using various instruments to achieve that and so on, so we have to be theoretical until the end of the month, anyway, and then assuming this reaffirmation, I would issue a show cause order and have a hearing and ask the Board to appear and ask why a plan shouldn't be adopted, what objections they had, if any, and then depending on the outcome there, issue a final order.

Q I see. Now, when you issue this final order, Dr. Nyquist, and if you did issue a final order after such a hearing which was disobeyed, is that the time that you consider taking the steps of exercising your powers of sanction?

A. Yes. That is true. I mean, you can't take away State aid or ask or try to institute proceedings through Board members until you have issued a final order and that hasn't been done.

Q I see. Are we correct in assuming that your steps toward racial integration in the schools are an adjunct to a drive for a quality and improved education?

A. Yes, I think it is part and parcel.

Q I see. Can the timing of the method by which integration is brought about in the schools have a detrimental effect on quality education?

A. Yes. I wouldn't like to interrupt, - interrupt a middle of a school year at any time. I think the best time is to time it so that you could, - as far in advance of the opening of the school year as you can so there is plenty of time to get ready. I strongly believe that it works best, a racial desegregation policy and racial integration which ought to follow are a little different, involves with the community and the teachers and getting the students involved as well so everybody understands they are going to have [illegible] relationships so that everything can go smoothly. It works best when that is done.

MR. PANFIL: I see. I have no further questions of this witness, your Honor.

THE COURT: Anything else, Mr. Schwartz?

MR. SCHWARTZ: Mr. Gregory has a right to cross examination.

THE COURT: Mr. Gregory, I am sorry. Mr. Gregory, any questions?

CROSS EXAMINATION BY MR. GREGORY:

Q Dr. Nyquist, earlier in your testimony, you testified that you found that the actions of the School Board have, in fact, - did, in fact, violate school policy, is that correct?

A I think the question was did it violate Regents policy.

Q Well, Regents policy, yes, with respect to segregation, is that correct?

A Yes, by not integrating the schools, yes.

Q All right. Now - -

THE WITNESS: Your Honor, could I ask who he is counsel for?

THE COURT: I am sorry. This is Mr. Gregory. He is counsel for the Board of Education of the City of Buffalo and also the Common Council for the City of Buffalo.

THE WITNESS: I see. All right.

THE COURT: He is an associate of Mr. Manguso who is the Corporation Counsel.

THE WITNESS: Yes. I know him. Thank you.

BY MR. GREGORY:

Q I assume before these orders were issued to the Board of Education, that an extensive and thorough study of the racial composition of the Buffalo School System was made by the Regents, is that correct?

A Well, one, - several studies by the School District itself and by our own staff, yes.

Q All right, and was anything determined as a result of this study as to how the racial imbalance that you ordered them to correct came about?

A. How it came about?

Q. Yes, what caused it?

A. I am not sure that that was determined. I know that in our own findings, and I think it is in the material that we prepared, that there were a few cases of what we would call actual de jure segregation in the City of Buffalo.

Q. Could you relate those?

A. In other words, by actions or inactions of the Board itself. As I say, there were six or seven schools involving certain practices at the time. I can't remember precisely what they were but I am very clear in my memory of the general category. Now, for what caused all the rest of it, I am not, - we didn't, - I don't think we went into that.

Q. What specific affirmative actions of the Board were you referring to in your earlier testimony when you said that the actions of the Board violated the Regents policy?

A. Well, by not doing nothing. That is an action too.

Q. I beg your pardon?

A. By not doing anything, by doing nothing.

Q. All right.

A. Not doing anything is an action and by no means not doing anything is certainly not compatible with Regents policy of encouraging and doing something about racial integration.

Q. All right, but is there any other thing that you have in mind or that you had in mind when you answered that question other than their supposed inaction in this area?

A. Well, that is big enough. I had nothing else in mind.

Q. All right.

A. Except, as I say, at the time, whether those prevail precisely at this moment or not, but I am very clear that there were certain actual cases which amounted to more than just de facto segregation here in Buffalo.

Q. But at this particular point, you can't tell us what those were?

A. I would have to refresh my memory.

Q. All right.

A. We identified them at the time I had my staff here.

Q Okay. Could you just give us, in your opinion, - Strike that. Could you give us what, in your opinion, you considered desegregation on the part, or what you wanted the Board to bring about in terms of desegregation; something more specific than just that terminology?

A Well, within, - within a margin, a percentage range of redistribution of both white and minority students here in Buffalo.

Q Within what range?

A I forget precisely what it is. It is something I would have to guess at this point, five or ten per cent on either side of what the district average is.

Q All right. Then is it fair to say that your idea of a completely desegregated school system would consist of a racial composition in each and every school in that particular district - -

A Within a range.

Q Mirroring within range the racial composition of the entire community?

A Yes.

Q In other words --

A That's one plan, yes.

Q Pardon me?

A Yes, that's one plan. We had originally approved the Middle School Plan, but the City Council, I guess, frustrated that one. At least, it never developed.

Q Okay. Is it not a fact that in your latest directive which, - or the last and latest directive to the Board, written, that you asked them to desegregate the Buffalo School System to a point where the School System would, in fact, reflect the same composition with respect to the student body as the population of the community?

A Yes, I think it involved that generally.

Q Pardon me?

A I think it involved that generally and I think I was willing also to phase it in rather than having it done all at once, as I remember the negotiations.

Q Okay. Did you state, this last statement that you made, that it could be negotiated, did you state that in your letter to them, to the Board?

A What do you mean by "negotiated"?

Q I don't know. You said it, Dr. Nyquist. I didn't.

A I think somewhere along the line I expressed, - I think it was in the earlier questioning of saying how disappointed, - some first steps weren't taken. I am sure that was expressed somewhere along the line and I can't remember whether it was by letter or by my surrogate, my deputy commissioner or by myself. I can't remember.

Q Did your study indicate or reveal to you, - not your study but the Regents study, indicate or reveal to you sufficiently so that you could form an opinion as to whether or not the Buffalo School System, particularly on the elementary school level could, in fact, be desegregated within that standard that you have described, within a few points of mirroring the racial composition of the community without compulsory busing.

A. Well, I don't recall that either my predecessor or myself had ever ordered the instruments by which racial desegregation was to occur.

MR. GREGORY: Your Honor, if I may, without being disrespectful to either the witness or the Court, I submit that the answer was totally inresponsive to the question.

THE WITNESS: Reframe it and I will try to be more precise.

THE COURT: Why don't you try to rephrase it then, Mr. Gregory.

BY MR. GREGORY:

Q All right. You told me early and let me see if I can break it up. You told me earlier that the Regents or somebody at least officially connected with the Regents made a study of the racial balance or imbalance of the Buffalo School System?

A My staff, yes.

Q Which predicated you and your predecessor to make certain demands of the Buffalo Board of Education, is that correct?

A Yes.

Q All right, and basically, these studies revealed that the Buffalo School System was racially imbalanced, is that correct?

A No question about that.

Q All right. Now, my question to you was did you or your predecessor, Dr. Allen, based on the results of this study, the report made to the Regents, did this indicate to you whether or not the Buffalo School System, the Buffalo Public School System could, in fact, be segregated to the point that you expressed to the Board in your communication that we discussed a few minutes ago, whether or not this could have been accomplished without the aid or assistance of compulsory busing?

A. It probably could not be achieved without transportation by some motor vehicle or some other means, yes.

MR. GREGORY: All right. That is all. Thank you.

MR. SCHWARTZ: I would like --

THE COURT: Mr. Schwartz?

MR. PANFIL: I have a couple of exhibits, do you mind?

MR. SCHWARTZ: Sure.

RECROSS EXAMINATION BY MR. PANFIL:

Q Dr. Nyquist, Thomas Sheldon submitted answers to interrogatories at the request of counsel for the plaintiffs, one dated March 4, 1974, containing a sequence of answers and the other dated July 12, 1974. I take it these interrogatories were directed to you and Thomas Sheldon acted on your request submitting these answers?

A. Yes.

Q. Which you affirm at this time?

A. Yes, I do.

MR. PANFIL: Thank you.

THE WITNESS: All of them.

BY MR. PANFIL:

Q. I have four sheaves of paper which I would like you to look at and which I would like to have marked for identification. Could you tell me if you are familiar with the contents?

THE COURT: Excuse me, Mr. Panfil. It will be easier for Mr. Nyquist to identify them if we have Mr. Walsh mark them first and he can refer to the exhibit and tell us what the exhibit is.

MR. PANFIL: All right.

(Plaintiffs' Exhibits Number 284, 285, 286, 287, 288, inclusive and respectively, marked for identification.)

BY MR. PANFIL:

Q Commissioner Nyquist, is there a difference between the selection of a site for a school and the selection of a district which that school will then serve within the City? There is, is there not?

A. I am not quite sure, - do you mean is there, - do we have, - as I said, as I said earlier, we don't have any powers with respect to New York City, but we do have with respect to all other school districts except we haven't exercised them with respect to the four big cities outside of New York City.

Q I see. I am thinking in the terms of a selection of a site for Woodlawn Junior High School.

A. Here in Buffalo, we had nothing to do with that.

Q You had nothing to do with the selection of the site. To your knowledge, would it be possible to district that school for students of all races equally?

A. I am not that familiar with it. I can speak to the general case. Sure, you can draw school, - attendance lines.

THE COURT: Is the question, - can the Commissioner's office draw the attendance lines? Can you do that?

THE WITNESS: No. I only have an appellate power there. That is to say if there is an appeal to the Commissioner on attendance lines, then I can adjudicate it, but I can't set those to begin with. That is up to the local school district, every school district in the State. It is a matter of local controll.

BY MR. PANFIL:

Q Thank you, Commissioner Nyquist. I ask you to take a look at the exhibits numbered in sequence 284 through 288. Are those documents or pamphlets in current use in your department for the guidance of school districts in building and selecting the sites for schools?

A. I imagine they are. I would have to look at the dates, but I think, yes, I would say they are in effect.

Q They are official documents, at any rate?

A. Oh, yes. We have issued all of them, unless there is some change that I don't know about, I assume they are in effect.

MR. PANFIL: Thank you. I will offer these at a later time, your Honor, and I anticipate some argument. No further questions.

MR. SCHWARTZ: With the Court's permission, Mr. Griffin can handle some of the redirect.

THE COURT: Mr. Griffin.

REDIRECT EXAMINATION BY MR. GRIFFIN:

Q Commissioner Nyquist, relative to what you may or may not direct the Buffalo Board to do at some time in the future, first of all, as you told us earlier, you are, you serve at the pleasure of the Board of Regents of the State of New York, is that correct?

A Yes, I said that.

Q And there has been a change of members of the Board of Regents within recent months, is that correct?

A Two new ones last year and two new ones this year.

Q And you indicated that at the present time, the Board of Regents is undergoing a re-evaluation of its policy, is that correct?

A. Yes, a matter of public knowledge.

Q. And, of course, the Board of Regents could determine to replace you at any time, right?

A. Absolutely, when you serve at pleasure.

Q. And the Board of Regents could decide at the end of this month that they would havea different policy relative to integrated education and racial balance in the schools, is that correct?

A. I said that in other words earlier.

Q. So we have no assurance, - Strike that. Now, you recognize, the Commissioner's office through Commissioner Allen recognized through the Yerby Dixon decision in 1965 that there was a seriously imbalanced situation in the Buffalo School System that should be corrected, right?

A. Yes.

Q. And it is now approximately nine and a half years since that direction was given to the Buffalo Board by the Commissioner's office and not only has the situation not improved, it has gotten progressively worse, is that correct?

A. Well, that is your language. I am not precisely up to date, but it could be.

Q Well, did you not, in your directive to the Board of January, 1972, point out that segregation had gotten worse in Buffalo and that the number of predominantly black and predominantly white schools had progressively increased over the seven years since the decision in Yerby Dixon in '65, and to refresh your recollection so that we may be completely precise, I hand you your letter of January 20, '72, Exhibit 103, and ask you to refer to the second paragraph on the second page.

A Okay.

Q Did I state it accurately?

A Yes.

Q All right.

A I said it was possible without even seeing the letter. I am willing to believe it, knowing what happens in cities.

Q So your answer now would be not only was it possible, that was the fact in Buffalo, that it became progressively worse during the seven years, right?

A Yes.

Q And you stated in this letter of January 20, 1972, "Faced with the hard fact that segregation is more severe in Buffalo now than it was seven years ago with over twenty schools more than ninety per cent black and twenty-nine schools, ninety per cent or more white, it is clear to me that only a new approach can equalize educational opportunity for the children of Buffalo". That was your statement then, right?

A. Yes.

Q. Now, as Commissioner of Education charged with the responsibility of assuring quality education and charged with the responsibility of implementing the Board of Regents policy to have integrated education was not the Buffalo situation as of January '72 a top priority item within the Commissioner's office?

A. One of the ones, yes.

Q. And you sa. fit, and I say this, - strike that. You found it necessary and I intend to be positive in this sense, to come to Buffalo in February of 1972 before the Board resolved whether it would comply with your directive or not, is n't that true?

A. I made a visit here.

Q. You had a press conference, right? Well, that is immaterial.

A. I don't know. I guess reporters were around. I can't recall a press conference.

Q. Now, one of your purposes, and I assume the principal purpose in coming was to make sure that your directive to correct this progressive situation would be complied with, is that right?

A. One ofthe steps taken by appearing personally here in Buffalo at the Board.

Q. And there was a sense of urgency about it, was there not?

A. As one of the steps to be taken, yes.

Q. And you are no longer under any statutory or legislative disability through a law that was passed in '69 and then declared unconstitutional in 1970; you didn't have that as a problem anymore?

A. No, but I have explained what happened over a period of time.

Q. Now, you learned, did you not, that the Board in March of 1972 refused to follow your directive, is that correct?

A. Yes.

Q. And as you testified earlier, that constituted, as of that time, in your judgment, willful refusal of the Buffalo Board to comply with your directive?

A. But not a formal order.

Q. Pardon?

A. Not a formal order.

Q. But it was in your judgment as of the spring of 1972 the willful refusal of the Buffalo Board to comply with your directive?

MR. PANFIL: Your Honor, I object to that. I submit the witness has already answered the question.

THE COURT: No, overruled.

THE WITNESS: Do you want to repeat that question.

BY MR. GRIFFIN:

Q. Yes. It was, was it not, as of the spring of 1972, following the March meeting of the Board, you regarded the conduct of the Buffalo School Board as a willful refusal to obey your directive, isn't that true?

A. Yes, and another tact was then desirable.

Q. Well, you knew, as of that time, that the Buffalo Board was not going to comply with your directive, isn't that true?

A. Yes.

Q And you found it necessary to send your own team in?

A. To devise a plan.

Q To devise a plan, and that was ready as of November '72, correct?

A. I can't recall the precise time.

Q Well, the record shows that the so-called Grenda Plan that was introduced in evidence was a November '72 report. Now, the situation got progressively worse in the school year 1972, did it not?

A. Yes, I believe it did.

Q And in early '73, there were meetings held with the Buffalo Board in an effort to try to persuade it to do something and they still didn't do anything, correct?

A. There were meetings in '73, right.

Q And then - -

A. Including with one of the Regents.

Q And then nothing occurred further and a letter was addressed to you by the former president of the Buffalo Board, Mr. Gardner, and that letter was openly critical for the inaction on the part of the Commissioner's office in not achieving anything in Buffalo, isn't that correct?

A. It was a nice letter but critical, and I think we have reviewed that letter or series of letters already.

Q. Right, and then you responded in October of 1973 saying that you were disappointed and knew, - had known the situation Buffalo, is that correct?

MR. GREGORY: If it please the Court, I don't really see the purpose of this examination. It is not really re-direct. It is just going over what he testified to on direct and almost word for word.

THE COURT: I take it Mr. Griffin has some point here to make. It won't be long because we are now into October of 1973, and we are moving very quickly. Go ahead, Mr. Griffin.

BY MR. GRIFFIN:

Q. You did have that exchange of correspondence, which is in the record where you, in effect, acknowledged Mr. Gardner's letter and said that you were disappointed with the situation, right?

A. Right, yes.

Q. And in that letter, Mr. Gardner pointed out the fact that this case was pending, did he not?

A. Obviously.

Q. Pardon?

A. Obviously.

Q. And nothing, - nothing was done, - Strike that. No order was given or program was implemented during the spring or summer of '73 for the 73-74 school year, is that correct?

A. Right, but when you are talking about the letters from Mr. Gardner, one of them, as I remember, was October, to be clear. Are you backtracking from October?

Q. My question is nothing was done by your office to direct the implementation of - -

A. That's right.

Q. The plan to desegregate the Buffalo Public Schools?

A. That's right.

Q. In the spring or summer of '73 for the 73-74 school year, correct?

A. That's right, obviously.

Q. Nothing was done in the spring or summer of 1974 to implement a program to desegreate the Buffalo Public Schools for the 74-75 school year?

A. That's right. I have explained that. I can't do it from a hospital bed.

Q. Well, I am not - -

THE COURT: Mr. Nyquist, you have assistants, no doubt, in your office, isn't that true?

THE WITNESS: Oh, yes.

THE COURT: All right. Very well. Go ahead, Mr. Griffin.

BY MR. GRIFFIN:

Q. And you have, as you told us - -

A. Excuse me. Your Honor, could I respond to your statement?

THE COURT: Yes, if there is some reason why you were the only person who can serve, I think we ought to have that on the record, if you are the only one who could act.

THE WITNESS: As I said earlier, I had to have a show cause hearing and I had to preside and that's why I said I couldn't do that from a hospital.

THE COURT: In your absence, are you the only one that could take care of that?

THE WITNESS: I would have to ask advice of my counsel on that. When you start with a case like this, you stay with it and my Executive Deputy Commissioner has powers to hear cases also, but I don't know if he has ever, - I don't know of cases and I would have to ask the advice of counsel, whether he could substitute for me. That is a point I really don't know, legally.

THE COURT: Mr. Griffin.

BY MR. GRIFFIN:

Q Just to conclude, today, October the 8th, 1974, is approximately nine and a half years after the Yerby Dixon decision and year and year during those nine and a half years, the racial imbalance situation in the Buffalo System became progressively worse?

A Yes.

MR. PANFIL: I object, your Honor. The witness didn't testify to that.

MR. GRIFFIN: He just did then.

THE COURT: Well, he can. Overruled. Mr. Nyquist, while Mr. Gregory is looking for a paper, before you talked about attendance zones and by that I would mean, and I want to be sure we are talking about the same thing, by that you mean, and under your, - in your field that means district lines of a school, I think they have been referred to as.

THE WITNESS: Within the school district. In other words, you see, you draw, - the kids in these four blocks are going to go to this elementary school, yes.

THE COURT: We talked about, before, the policy and it is still the policy of the Regents to carry out the direction of the Supreme Court under the Brown case and the subsequent cases set forth

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by the Supreme Court. I think we all know that in many cases, that there is imbalance because of the way some of the districts, the school districts or the attendance lines are drawn. If this would violate the policy of the Regents, you told us before about the sanction you could take, which seems to me to be pretty drastic action. That is, you could remove the Board members who refuse to carry out, willfully, the direction and policy of the Regents; you could withhold funds from the school district. Isn't there any middle ground? If the Board refused to follow your policy and your direction, isn't there, by some kind of, let us say, proceeding, a show cause proceeding or some other way, redrawing of district lines?

THE WITNESS: Redraw attendance lines?

THE COURT: Attendance lines.

THE WITNESS: If that is the specific issue in the appeal.

THE COURT: I see.

THE WITNESS: I mean, I am not a lawyer, your Honor.

THE COURT: As far as you know, that hasn't been done with any of the others, and of course, the Urban schools, the large schools, are handled in a different way from the smaller school districts?

THE WITNESS: With respect to attendance lines, you mean?

THE COURT: In respect to many ways?

THE WITNESS: Oh, yes, there are differences in the statute. New York City is different in many ways and is handled differently, in different ways for a lot of reasons.

THE COURT: Go ahead, Mr. Panfil.

RECROSS EXAMINATION BY MR. PANFIL:

Q Dr. Nyquist, is it not true, on many occasions, when the attendance lines are drawn to effect a balance, parents move out, white parents will move out with their children and the balance will then become unbalanced again?

A That has happened, sure.

Q So that this is not just one picture that remains static, it is continually moving and you are going to stay on top of it, isn't that true?

A It is the nature of our society, yes.

Q Is there anything else you would like to say about the action or inaction in the spring and summer of '72 and '73 and the spring and summer of 1973 and 1974?

MR. GRIFFIN: I object to the form.

THE WITNESS: I think we reviewed the sequence of events here and I see no reason for taking the time to review it here.

MR. PANFIL: Thank you.

MR. GREGORY: May it please the Court, I just have a few more questions. I'm looking for a particular exhibit.

THE COURT: Which exhibit are you looking for?

MR. GREGORY: I have found it. It is Exhibit 103 from Dr. Nyquist in the spring of

'72 or '73.

THE COURT: Can you help?

THE WITNESS: Here is one. No, this is from Mr. Gardner. - to Mr. Gardner from me, so that can't be it.

THE COURT: Mr. Schwartz, can you help? Was it used this morning, Mr. Gregory?

MR. PANFIL: It was just referred to now, your Honor, I think.

THE COURT: That is why, in a tax case, Commissioner, we always direct that the lawyers have somebody at the table with them besides attorneys.

THE WITNESS: To keep track of everything.

THE COURT: To keep track of exhibits. While they are looking, to get back to this middle ground, are there any other steps besides those two sanctions you mentioned before which your office can take to carry out the policy of the Board?

THE WITNESS: I tried all those. That was the point of my statement, your Honor.

We tried everything else in between, persuasion, providing technical assistance, developing a plan of our own and finally, of course, nothing has happened. I don't see anything else that I can do legally. I suppose, your Honor, there is one other thing, talking theoretically, if I issued an order and there would be defiance, I suppose I can take the Board to court, that would be another thing, to have it enforced.

THE COURT: To go into State Court?

THE WITNESS: Yes.

THE COURT: And to ask for some kind of relief?

THE WITNESS: Yes, short of removing the Board. I suppose I could do that too.

THE COURT: Contempt?

THE WITNESS: We have never done that before.

THE COURT: As far as you know, that has not been a procedure which the Board has followed?

THE WITNESS: No, we have not followed that.

THE COURT: As far as monies for your operation, that comes from the State legislature too?

THE WITNESS: For the entire department or just this aspect of it?

THE COURT: No, for your entire department?

THE WITNESS: It comes from three sources, really. Overwhelmingly from the State legislature and State funds; about five per cent Federal funds and a very small part that our private funds that are given. We have a unique system of education in this State. It is called the University of the State of New York. It is a fourth branch of Government. It is non-political and that Board of Regents who are the head of the University, that is a constitutional concept embracing all of education in the State and the Regents can receive private funds as well as the department, but the Regents receive most of them for various research purposes, scholarships of certain types and so on.

THE COURT: Just looking at the monies you get from the State, does the State legislature, - how do you work with them on the budget? Is it a line budget? Do they have to approve all the positions and projects?

THE WITNESS: Well, yes. We submit a very detailed budget to the director of the budget, the Governor's director of the budget and we don't get everything we ask for. I don't know anybody who does, and then when the Governor approves a final budget at the beginning of the fiscal calendar year, it then is reviewed by both houses of the legislature, the fiscal committees, and they always make some changes. They can't add, but they can take away and it is not in a precise line. For instance, it wouldn't list three stenographers in my office. It wouldn't be anything like that. It would come under a broad line item category if you can call it that, of say, central administration, so many millions of dollars.

THE COURT: Mr. Gregory, were you able to find that?

MR. GREGORY: It is a letter of January 20, 1972, Dr. Nyquist and the Board.

THE WITNESS: I thought you referred to it.

MR. SCHWARTZ: Yes, that was a letter which was quoted in the November '72 report prepared by Mr. Grenda and I quoted excerpts that were in that report and the chronology.

THE WITNESS: That was it, yes.

MR. SCHWARTZ: In the beginning, I did not have a copy of that letter itself.

MR. GREGORY: There is no copy of that letter?

MR. SCHWARTZ: We never saw that letter. I quoted from that report he indicated.

MR. GREGORY: Your Honor, can we take a five minute recess, please?

MR. GRIFFIN: Exhibit 103 is January 20, '72.

THE COURT: Mr. Gregory, is there some way you can call it to the Commissioner's attention what your inquiry is?

RECROSS EXAMINATION BY MR. GREGORY:

Q Yes. Dr. Nyquist, in earlier examination, I think you testified that in a letter dated January 20, 1972, you asked the Board in so many words, - I just made some notes, - to strengthen their efforts?

A Yes.

Q And that you supposedly asked them to reply within four months. Now, is there a written correspondence to this effect?

A Well, if that is quoted by Mr. Grenda who works for me, of course, there is some document somewhere and I have to ask my counsel here, but I am sure that we could dig it up for you.

MR. PANFIL: I will be happy to look, to cooperate to that extent.

THE COURT: Is that the point that he asked the Board, he gave the Board four months to reply?

BY MR. GREGORY:

Q Exactly. In that particular communication, if there is such a communication. I just assumed from the testimony of the witness earlier.

A Is that your question about that?

Q I am just interested right now. It is my impression there was a written communication to the Board.

A Quoted in that report.

Q Indicating in a sense that you did, in fact, want them to strengthen their efforts toward integration and you gave them something like three or four months to reply to this request.

A I can't remember exactly.

THE COURT: The Grenda report refers to this series of happenings, is that correct, Mr. Griffin?

MR. GRIFFIN: As I understand, your Honor.

MR. SCHWARTZ: The bottom line of that letter doesn't say four months. It says "Please report to me by February 15, 1972".

THE COURT: This is the first time I ever heard anything about four months.

THE WITNESS: Me too.

MR. GREGORY: I don't know, your Honor, I just thought it was January to April, the dates, - nothing about four months, there is a particular date.

THE COURT: Is there anything further, Mr. Schwartz, Mr. Panfil?

MR. PANFIL: I have nothing further, your Honor.

MR. GREGORY: All right. That is all. I have no questions.

THE COURT: Thank you, Commissioner Nyquist.

THE WITNESS: Thank you, your Honor.

THE COURT: We will take a recess.

(Recess taken at 12:05 p.m.)

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PROCEEDINGS: After recess, 2:13 p.m.

APPEARANCES: As before noted.

MR. GRIFFIN: May it please the Court, your Honor will recall that at the close

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THE WITNESS: Thank you.

MR. GRIFFIN: May it please the Court, I do not see Mr. Service. We telephoned to find where he might be and we will continue our effort. I do have Mr. Anthony Dutton who was a witness scheduled this afternoon also and I am prepared to go ahead.

THE COURT: All right. We will hear Mr. Dutton.

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ANTHONY L. DUTTON (114 Chapin Parkway, Buffalo, New York), a witness called by and in behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. GRIFFIN:

Q Mr. Dutton, you presently reside at 114 Chapin Parkway in the City of Buffalo, is that correct?

A That's correct.

Q When did you move to the City of Buffalo?

A The end of July, 1963.

Q And have you lived in the City of Buffalo continuously since July of 1963?

A Yes, I have.

Q Are you an attorney engaged in the private practice of law in the City of Buffalo?

A Yes, I am.

Q Of what law school are you a graduate and what year?

A The University of Pennsylvania in 1963.

Q Did you then come to Buffalo and commence the private practice of law in 1963?

A That is correct.

Q Now, shortly after you arrived in Buffalo, did you become interested in the matter of housing?

A That is correct. During sometime in 1964, I became a member of a nonprofit corporation which was named Housing Opportunities Made Equal.

Q And that particular organization has the abbreviation H-O-M-E?

A That is correct.

Q Was that organization in existence when you came to Buffalo in '63?

A I don't know whether it was in existence when I came, but it certainly was sometime in 1964.

Q And generally, what is the objective of that particular organization?

A. The HOME Organization was and still is a not-for-profit corporation now. It is a tax exempt corporation whose purpose is to achieve equal opportunity in housing for all persons regardless of their race, religion, creed.

Q When you joined the HOME Organization, was that in 1964?

A. That's right.

Q In what capacity did you join HOME?

A. I joined HOME first as just a member and a volunteer in various activities. Then in 1965, I became a member of the Board of Directors and in 1967 I became a vice-president and served as a vice-president until 1970. In 1970, I was elected Chairman of the Board and served in that capacity until 1972 and I am now a member of the Board of Directors, but not an officer.

Q When you became vice-president in 1967, did you serve - -

A. 1965.

Q Excuse me, 1965. Was there more than one vice-president?

A. Yes, there were. There were several. At that time, we had various people who were responsible for different areas of the organization's interest by and large who had the title of vice-president. There would be a vice-president who is in charge of handling things, publicity, press release. I, at that time, was responsible, principally, for advancing and presenting of discrimination cases before the State Division of Human Rights and I also worked with the gentleman who was in charge of establishing a committee to work with the Buffalo Municipal Housing Authority, and what problems we thought we perceived there.

Q With respect to enforcement activity that you might have participated in in 1965 and in the years following, would you describe in a general way your experience?

A. The general sort of things I did in terms of what you might call enforcement which I believe would be the matters before the State Division of Human Rights at that time, - now it is called the State Human

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that material with respect to housing is immaterial and irrelevant to this issue, based on the decision of the Circuit Court of Appeals in the Detroit case and the Supreme Court in the same case.

THE COURT: Thank you, Mr. Gregory. We will note your objection and I will listen to your argument later and we will hear the testimony now.

BY MR. GRIFFIN:

Q With respect to the persons that your organization acted for and rendered a service, were they primarily, if not practically all, members of the nonwhite group?

A Yes. I would say, if, within nonwhite you would include, - at that point I would say they were principally within what would generally be referred to as the black population.

Q Now, based upon your experience and familiarity in the mid 1960's, what was the situation relative to the type of rental housing in the City of Buffalo that existed, first of all, that existed?

A. The bulk of the rental housing at that time in the City of Buffalo was contained in what would be known as two-family dwelling units, which is normally a first floor and a second floor flat. The bulk of those, to refine it a little bit more, the bulk of them and I am not sure of percentage, but every figure I have ever heard is well in excess of fifty per cent of that housing would be in what is called owner-occupied which is that the owner or a member of his immediate family would reside in one of the two units of the dwelling building.

Q. Now, you made reference to handling complaints and assisting people through the,- was it the State Commission against Discrimination?

A. No, State Division of Human Rights.

Q. State Division of Human Rights. Now, as of the mid 1960's was there any statute of the State of New York or rule or regulation of the State Division of Human Rights which made it unlawful for an owner occupying a two-family home to discriminate against a potential rentee on the basis of colcr?

A. No. The law was a New York Law against discimination which is contained in the Executive Law and it expressly excluded from its purview owner-occupied two-family dwellings.

Q With respect to the experience of enforcement activity by the State Division on Human Rights in the early 1960's through the mid 60's, what was the experience that home had relative to the enforcement activity of the State Division of Human Rights?

A The experience which I had which I believe also was the experience of the HOME Organization, what the State Division of Human Rights was by and large ineffectual. In part, because in Buffalo, because it did not have the power to deal with where the bulk of the housing was which was the owner-occupied two-family, but in addition, because it either refused or failed to exercise those powers which it did have. It would very seldom use the power of subpoena. It would very seldom use its power to investigate complaints on its own. It would, - very often, the personnel working within it, to my experience, would be unhelpful to people filing complaints. I can recall a situation where I once went with a complainant to file a complaint and the complaint taker who was a clerk in the office said to the person, "What is a nice girl like you trying to make such a fuss as this", and by and large they were not helpful to people filing complaints and generally, were not effective.

Q And is the condition you have just described on the part of the State Agency one of the major factors which prompted HOME, a nonprofit volunteer organization to work in the area that you have just described?

A Well, I think yes, that we perceived that left by themselves the average citizen who is discriminated against would not a fare very well in trying to find the agency to file and process their own complaint. If we were not involved in a complaint, we frequently found it took months before any action was taken. It was only through constant pressure upon the agency that you were able to move cases to some determination and the complainants needed assistance in presenting their story to the Commission.

Q Now, were things, - was the situation such that on August 10, 1967, the then Governor, Nelson Rockefeller of the State of New York appointed a committee to look into the laws, procedures and enforcement agencies that dealt with the matter of rights for equal opportunity in housing, among other things, in the State of New York

A. That's correct. It was August 10, 1967.

Q. And what occurred on that date?

A. At that time, the Governor appointed a committee to review the New York Laws and procedures in the area of civil rights.

Q. And that was a committee of citizens drawn from throughout the State of New York?

A. That is correct.

Q. And did that committee conduct hearings in various locales, including the City of Buffalo?

A. Yes, it did.

Q. And as a result of its work, did it render to the Governor of the State of New York, a report of its findings and its recommendations?

A. Yes, it did.

Q. And do you have before you an exhibit marked in this case which is a copy of the Governor's committee's report?

A. Yes, I do.

Q. What exhibit number is that?

A. It is Plaintiff Exhibit 251.

Q And what is the date of the report?

A March, 1968; March 27, 1968.

Q And you are familiar with this particular exhibit and report, are you not?

A Yes, I am.

Q Now, was the subject of the owner-occupied housing in Buffalo, was that treated in this report?

A Yes, it was.

Q And can you point to us that portion of the report where it is treated?

A If you will bear with me for a minute. I believe I have found it now.

Q Are you at Page 27?

A Yes, I am.

Q All right. What was the findings of this committee appointed by the Governor of the State of New York relative to the available housing units in Buffalo?

A It was that approximately ninety per cent of all available renting units in the Buffalo area are not within the jurisdiction of the present anti-discrimination law, although discrimination in the rental of such units appears to exist.

Q And did the report recommend to the Governor that legislation be passed to cover owner-occupied rental housing units?

A. Yes, it did.

Q. Has such legislation been passed by the State of New York?

A. Not to my knowledge, no.

Q. Not through to today, is that correct?

A. Through to today, it has not, to my knowledge.

Q. Now, are you familiar, Mr. Dutton, through your experience with a Model Cities Program that the City of Buffalo embarked upon?

A. Yes, I am.

Q. And did there come a time when the City of Buffalo made an application for a Model Cities grant?

A. Yes, such a time did come to pass.

Q. And to your recollection, was the subject of the owner-occupied housing treated within the Model Cities application?

A. Yes, it was.

Q. Now, I direct your attention to Plaintiffs' Exhibit 260 and ask you if you will tell us what that is?

A. This is the City of Buffalo's planning grant application for the Model Cities funding, dated April, 1967.

Q If I may have just a minute, your Honor, to locate another exhibit. I direct your attention to a portion of Exhibit 260 which is Part 3 thereof, is that correct?

A It is so indicated Part 3, yes.

Q And are you familiar with the fact, Mr. Dutton, that in the Model City application which is, - what date is the Model Cities' application?

A This one is dated April, 1967. I believe there was also a later one which also dealt with the same problem.

Q And was there a section within Part 3 starting at Page 25 dealing with the subject of housing choice?

A Yes, there was.

MR. GREGORY: May it please the Court, at this time, he is apparently making reference to some sort of an exhibit and at least my records don't indicate that such an exhibit as 260 has ever been identified or introduced into evidence.

MR. GRIFFIN: That is correct, 260 has not been introduced in evidence. 260 on the portion that we have, for the record, is the Buffalo, New York planning grant application dealing with the Model Cities.

MR. GREGORY: Is someone going to identify it for purposes of the record?

MR. GRIFFIN: I thought Mr. Dutton had just - -

THE COURT: I thought that was the purpose of marking exhibits and showing exhibits. Is there any question about the authenticity of this application?

MR. GREGORY: No?

THE COURT: That would be made by the Mayor or in his behalf by one of the officials in the City?

THE WITNESS: I believe the application is signed by the Mayor.

THE COURT: We will consider it in evidence and then as far as relevancy or materiality, we will listen to your argument. Mark it in evidence, please.

(Plaintiffs' Exhibit Number 260 received in evidence.)

BY MR. GRIFFIN:

Q I will not take the time to read much of this because it is all part of the record, Mr. Dutton, but there is, in Part 3, a section which relates to housing choice, is that correct?

A. That is correct.

Q And it starts out under the subject of need by saying, and do I quote accurately, "For the great majority of Buffalo's model neighborhood area residents, there are three primary barriers to freedom of choice in housing", and then it goes on to describe various barriers, is that correct?

A. That is correct.

Q Now, does it contain, within this section, a subdivision known as "Program Approach"?

A. Yes, it does.

Q And are there contained in it certain representations that are made on behalf of the City of Buffalo relative to program approaches towards achieving the, - certain housing goals?

A. Yes, there are.

Q And what is the first one under "A" of the program approach?

A The provision of total coverage fair housing legislation together with machinery for its vigorous enforcement.

Q So it makes reference on Page 28 of this Part 3 to a provision of total coverage fair housing legislation together with machinery for its vigorous enforcement, is that correct?

A That is correct.

Q Now, last week, Councilman Horace Johnson testified here and certain exhibits were marked containing proposed fair housing ordinances that were introduced into the Common Council. Are you familiar with such proposals that were introduced in the Common Council?

A Generally, I am.

Q And are you able to tell us whether any such total coverage fair housing ordinance was passed by the Common Council of the City of Buffalo?

A No, it was not.

Q And did the City of Buffalo accept a grant from the United States Government for purposes of having a Model Cities Program?

A Yes, it did.

Q And so that the record is clear, what general area of Buffalo does the Model Cities Program cover?

A. Generally what is known as the Fruit Belt Area beginning westerly on Main Street, north, roughly to Humboldt Parkway area, south towards Genesee-Broadway and east, - I am not sure exactly the east border, but it is over towards Fillmore.

Q And would this include a large part of the Masten District?

A. Yes, it would.

Q Councilmanic district?

A. Yes, it would, both as it is now drawn and as it was drawn during the mid 60's.

Q Now, moving to another subject, Mr. Dutton, you told us that at some period of time while you were,- have been active for HOME, that you became involved in the matter of municipal housing, is that correct?

A. That is correct, for about a four year period from early '67 through late 1970.

Q And will you, - would you tell us, generally, the extent of your involvement with the Municipal Housing Authority?

A. Yes. It occurred to us on looking at the statistics of the projects under the control or under the administration of the model, - excuse me, the Buffalo Municipal Housing Authority that there were clear patterns of segregation, for whatever reason. Specifically, there were three projects which were 99 per cent or more black population. There were six - -

Q Which are those projects?

A They would be Willert Park, Ellicott Mall and Talbert Mall and there wer six projects which were 6 per cent or less black, which would make - -

Q Six - -

A Six per cent or more, - or less black, which would make them 93 or 94 per cent white.

Q And those projects were?

A I'm not sure I can name them all, but they were Kenfield, Langfield, Jasper Parish, I believe. I could, - if you will give me a second, I can get them for you.

Q Have you brought with you which have been marked as Exhibits, certain files from the HOME Organization?

A Yes, I have.

Q Which relate to these facts?

A Yes, I have.

Q And would it be helpful to refresh your recollection to refer to those files?

A It would be helpful.

Q And the date that you are speaking of having found segregated conditions within the housing facilities of the Municipal Housing Authority, what date are you speaking of?

A I am speaking, initially, of 1967. However, 1970 there had been no appreciable change from that.

Q Would you tell us, would you identify the additional number of facilities that were 94 per cent or more white and if you could give us also some idea of the number of housing units in each of those facilities, it would be helpful.

MR. PANFIL: May it please the Court, hasn't the man by the name of Einach also already testified to those facts?

THE COURT: Did someone else testify to them? Perhaps he did.

MR. GRIFFIN: My recollection of the record is that Mr. Victor Einach testified as to the facts and statistics from the period of 1934 and 35 through 1946, but that he offered no evidence beyond 1946.

THE COURT: Roughly, that is my recollection, Mr. Panfil, so why not let Mr. Dutton proceed.

THE WITNESS: I am now giving statistics which the source is the Buffalo Municipal Housing Authority's Research Division and these are the year 1966: Kenfield Project with 658 units was 3 per cent black; the LaSalle Project with 206 units was 3 per cent black.

BY MR. GRIFFIN:

Q Where is LaSalle located, by the way?

A LaSalle is in the Black Rock area. I am not sure I can pick it off on the map.

Q Kenmore Avenue?

A Yes. It is right on the very north border of the City, but I am not sure I could exactly locate it for you.

Q Northwest?

A Northwestern, what is known as the Black Rock area.

* * *

Q. Does that complete the information relative to what, to all of the facilities and the units and percentages as of 1966?

A. That's right. There were several after that time and during the period until '70 there were several new projects which were elderly projects which came on the stream, you might say, or were completed, and some scattered site housing were also ventured into by the Housing Authority, but those were the large projects and still are the only large projects except for elderly housing which has been constructed more recently.

Q. Now, these facts came to the attention of HOME, is that correct?

A. That's correct.

Q. And did you engage in a course of investigation and discussion with the Municipal Housing Authority relative to the reasons why they were in the segregated condition that you found?

A. Yes, we did.

Q. And would you tell us when that started, what you found from the Municipal Housing Authority as to reasons and what policies existed and what discussions there were in an effort to correct the situation?

A. Yes. We found that on reviewing the both Federal and State regulations under which they were operating that there was a requirement that for a Housing Authority which operated more than one project, that they treat the projects for purposes of application and assignment of tenants as one project. That is, there should be a central application taking and assigning office, and that people should be assigned where there are vacancies as if it were just one large project with a number of buildings within the City. That was required by both Federal and State regulations in 1967 and still is the case. Such a procedure was not followed by the Buffalo Housing Authority and at the end of our four year period of effort, such procedure still had not been adopted. Whether they have been to this date, I don't know, and the effect of that was very obvious and I will try to lead you through it to make it uncomplicated in saying it. As we perceived it, there were some 200 vacancies ordinarily existing in the Ellicott and Talbert Malls which were the two projects closest to the downtown, right behind Michigan Avenue, just east of the downtown area of Buffalo. When a person, regardless of race, would come in to the Housing Authority to apply, they would be told that "We have vacancies in Ellicott and Talbert into which you may move. However, if you would rather go to some other project, the manager of each project maintain an informal waiting list and you may go and see the manager of any project and have your name put on that waiting list". Many people, of course, would go down to the projects and have their name put on a waiting list. It was our perception that white people in the City of Buffalo had virtually all of the housing in the metropolitan area, at least open to them if they could afford it or find it to move into.

Q You mean housing in general?

A. Housing in general. A white person could live anyplace he could find a vacant apartment. There were no barriers other than perhaps economic. Black people, on the other hand, were, because up to 90 per cent of the rental housing in the City of Buffalo is in the owner-occupied two-family category, were excluded from all that rental housing within the

City of Buffalo. They could not get in because the bulk of it or a large part of it was outside of what was referred to as the ghetto in some circles, so a large part of the housing which was there was not available to them. As a result of this, when families would come to apply to the Housing Authority you would bring one other thing with you. When you came to apply, you carried with you a perhaps legal preference or priority which was given by law and by regulation and these priorities were based upon top priorities where all these people who had been displaced by Governmental action. The next priority were veterans. The third priority were persons who were really in unsafe and unsanitary housing, so you carried these priorities with you A white person coming to the Housing Authority would be told "You may move into Ellicott and Talbert and we can house you right away or you can go on a waiting list for one of these ordinarily white projects", and most white people generally found that they were able to do that. They did not move into Ellicott or Talbert and hence, it was 99 or 100 per cent black. On the other hand, black families more often than not when they came to the Housing Authority had no other choice. They came there and they had to have a roof over their heads so they had no choice but to move into the Ellicott and Talbert and once they moved in, then by definition the Housing Authority said, "You no longer live in unsanitary, unsafe housing because you are in one of our projects and by definition they constitute safe and sanitary housing, so hence, you lost your priority", so once you were there, it was impossible for you to transfer because every new person who came fresh to the Housing Authority brought with him his preference and the students were the ones, - one reason the students always got into Ferry-Grider is because they came into the category of not residing at that time in safe and sanitary housing. A student would come to the Housing Authority and say "I am new in town. I don't have a place to live", and they would say "All right, you qualify, because you are not living in safe and sanitary housing", so that once the black families got into Ellicott and Talbert, they were stuck there and in addition to the fact that they lost their priorities and even if they remained on the waiting list, say, at Kensington, they were constantly being bumped down by every new applicant who came in carrying some preference. On top of that, there was a $25 transfer fee that was imposed on anybody who transferred. There were other barriers and we always suspected there was some preference that crept in because the waiting lists were under the jurisdiction of the managers of the various projects and the central office which took the initial application would not know whether a person could move until the manager of the project called and said "All right, Mr. Smith on the waiting list has now moved to the top. Get out his application and tell him we have a spot for him here", and so Mr. Smith, knowing just who his applicants were, - or rather, the manager of a project knowing just who his applicants were, could control what people were called to transfer and it so happened that very, very seldom were black families ever called to transfer out of Ellicott and Talbert into the white projects.

Q Now, was the, - strike that. Were the matters that you have just described brought by yourself and

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involving one or two family owner-occupied families and judgments have been obtained stating that it was a violation of that Federal Statute to discriminate in one or two family houses and there is a more recent Federal Fair Housing Act which has different provisions.

BY MR. GREGORY:

Q Which is the one that,- well, strike that. Now, you testified with respect to the Model Cities application by the City. Can I see that application? You read from this report or you confirmed that Mr. Griffin was correctly reading, "Program approach", under subdivision, - the provision for total coverage fair housing legislation together with machinery for its vigorous enforcement. What does that mean to you?

A Well, that meant to me then and still does that the City would adopt a local law which would prohibit discrimination in any housing within the City of Buffalo and my recollection is that the Corporation

Counsel at that time advises that such law would be valid and at least one municipality downstate has adopted such an ordinance.

Q Well, do you feel that this is what the Federal Government was requiring, it was requiring fair housing legislation dealing with the entire City of Buffalo as a prerequisite to the granting of this Model Cities grant?

A My understanding was in requesting approval of its application, the City of Buffalo made a representatio to the Federal Government that "If you approve our application and ultimately give us grants, that we shall do that", yes.

Q That was your impression of it?

A That's correct.

Q It must have become aware to you at some time while you were involved in this thing that the City didn't, in fact, pass such legislation?

A That's correct.

Q Did you make this known to the Federal authorities?

A No, I don't believe that I ever did, no.

Q As far as you know, were the Federal authorities ever made aware of this?

* * *

A The ordinance which was, my understanding, which was drafted in fulfilling that representation, that covenant.

Q Fine. That was your understanding of what the ordinance was intended.

A I believe that is what it said on its face.

Q The ordinance?

A Right, the proposed ordinance.

Q The proposed ordinance, but by what did you come to this conclusion that this particular ordinance that you helped Councilman Johnson prepare was required by this particular provision?

A If you are suggesting to me that there is another reading of that sentence, in what I have said, I have not heard that ever suggested before.

Q I am not proposing anything.

A Okay.

Q I am just wondering what you base this conclusion on?

A What I think of the plain words of that representation.

Q Fine. In other words, what you testified to earlier is nothing more than your own conclusion and your own interpretation of the language contained in Subdivision (a) of Section 4, the program approach, is that correct?

A I thought I testified simply as to what that says. I thought we read that into evidence.

Q I see, so now you are talking about you don't even have an interpretation of that?

A Of course, I do. I just said that too. I said that to me it is clear on its face. I have never heard suggested what I think you are suggesting to me before, anyway.

Q Well, wasn't it a fact that you either explicitly or implicitly here today have said that the City violated their contract with the Model Cities program?

A I think that is the --

Q Because, - let me finish my question, please. Because they did not provide for total coverage fair housing legislation together with machinery for its vigorous enforcement throughout the entire City of Buffalo.

A That is the thrust of my testimony, yes.

Q Right. Now, my question to you and as I have been asking you right along, is what do you base this conclusion that namely, the City violated its contract by not adopting the ordinance you suggested with Councilman Johnson be adopted.

A Okay. I think I said this before, but I will testify once again; that I understood that to be a representation made by the City in applying for approval of its application and for funds. The application was approved and funds ultimately made available. I do not think that that representation has yet been fulfilled.

Q But it is just your opinion and conclusion as to what the alleged representation was, isn't that so?

A I believe it is clear on its face. I don't understand. You are asking something different.

THE COURT: I do not want to cut you off, but I think Mr. Dutton has said the same thing, that that is his opinion of what the writing meant and what the purpose of the proposed ordinance was.

BY MR. GREGORY:

Q Okay. Now, do you, of your own knowledge, now what, if any, housing violations in this particular area

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for the near future." The response to that paragraph 3(b) was: "No reactions are called for." The responses were dated March 4, 1974. I would like to have that clearly set forth in the record.

MR. PANFIL: No objection, your Honor.

MR. SCHWARTZ: Thank you, your Honor.

(Thereupon document was marked Plaintiffs' Exhibit 294 for identification.)

MR. SCHWARTZ: Your Honor, may it please the Court, we call Mr. Martin Sloane as a witness.

MARTIN E. SLOANE, called as a witness on behalf of the Plaintiffs, and being first duly sworn, testified as follows:

MR. SCHWARTZ: May it please the Court, we are calling Mr. Sloane as an expert

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ties within that agency function?

A. The Housing and Home Finance Agency consisted of five constituent agencies, which carried out the various federal programs of financial assistance to housing and urban development. My particular responsibilities --

Q. What were those?

A. Five agencies?

Q. Yes.

A. Federal Housing Administration, the Public Housing Administration, the Federal National Mortgage Association, the Urban Renewal Administration, and the Community Facilities Administration.

Q. And your function in that agency?

A. I was in the office of the Administrator, I was not in any of the five constituent agencies. My particular duties were in Civil Rights and housing and specifically for the first four or five months that I was at the agency, I participated in drafting an executive order on equal opportunity on housing, which ultimately was issued in November, 1962, and in preparing various backup papers on the legality of the executive order and on policy issues as well, and after the executive order was issued, I was in the unit which had responsibility for coordinating the enforcement of the activity under the executive order of the various constituent agencies of HHFA. The last year I was at the agency I switched to the Office of General Counsel. I was a legislative attorney and participated in the preparation of two major pieces of housing legislation; one, the Housing and Urban Development Act of 1965, which had the Rent Supplement Program in it, and the Demonstration Cities Act of 1966, which contained the Model Cities legislation.

Q. Now, how long did you remain with that agency, which we can refer to as HHFA?

A. I remained until April 1966 when I returned to the United States Commission on Civil Rights.

Q. In what capacity did you return and what were your responsibilities?

A. My first position was as Special Assistant to the Staff Director, and the first year that I was back, my duties related to solely working on the Commission's major study of racial isolation in the public schools, which was done at the specific request of then President Johnson, and that report was issued in

February of 1967, and my specific responsibilities, in addition to acting as the Deputy Director of that project, was full responsibility to the section having to do with housing, the relationship of federal housing policies to school segregation.

Q. All right. Now, that takes us up to what year, 1969?

A. Yes. Following the issuance of that report, my duties were still as an assistant to the staff director, and were primarily in congressional liaison, and that involved preparing testimony, commission positions on pending legislation, and there was a great focus on substantive housing legislation, during that period the 1968 Housing and Urban Development Act was pending.

Q. How long were you in that capacity?

A. Until June of 1969.

Q. What position did you then take?

A. I became Assistant Staff Director for Program and Policy Review. The office I headed up --

Q. The Program and Policy Review of the Civil Rights Commission?

A. Yes.

Q. What were your responsibilities and functions there?

A. I supervised the staff, which constituted the primary research arm of the Commission, and produced nearly all of the Commission's reports while I was there.

Q. And how long were you in that capacity?

A. Until October of 1973.

Q. What did you do then?

A. I accepted a position as General Counsel of the National Committee Against Discrimination in Housing.

Q. And what do you do in that capacity?

A. We primarily prepare housing litigation.

Q. Have you written in the field of housing and/or school segregation?

A. Personally?

Q. Yes.

A. In addition to the writing that I have done for the Commission on Civil Rights, I have written a number of articles for my own publications.

Q. What were the articles on and where did they appear?

A. The most were Law Review articles having to do with the legal aspect of protections against housing discrimination, exploring the possible legal scope of an executive order on equal housing opportunities, and also articles dealing with subsequent housing legislation and its relationship to equal housing opportunities.

Q. Have you given testimony before legislative committees on the subject of housing and/or school segregation?

A. Yes, I have. Several years ago I testified on behalf of the Commission, before Senator Mondale's Special Committee on Equal Educational Opportunities, on the relationship of housing discrimination and school segregation.

Q. Have you testified before other state or legislative committees?

A. Yes, I have, before both federal and state legislative committees.

Q. Have you spoken before groups of private or public officials on this question?

A. Yes, I have, both when I was with the Commission and in my current position as well. I have occasion several times a year to speak before civic groups.

Q. Have you appeared in court cases as an expert witness on this question?

A. Yes, I have.

Q. Can you give us some of those cases and give us a general idea of how many?

A. There are approximately six. I have testified in the Detroit School case, in the case in Richmond, Virginia and Atlanta, Georgia, and Memphis Tennessee, in the Dayton, Ohio School case, and in the Knoxville, Tennessee School case.

MR. SCHWARTZ: We have marked for identification Exhibit 295, which contains Mr. Sloane's vita and we would like to submit it in evidence, and ask that he be qualified as a witness to testify on the matter of housing discrimination resulting from federal government policies, and the link between that discrimination and school segregation.

THE COURT: Well, why don't we mark that in evidence. He already testified to it.

MR. SCHWARTZ: It is a resume.

THE COURT: All right. Mark it in evidence.

(Thereupon Plaintiffs' Exhibit 295, previously marked for identification, was received and marked in evidence.)

BY MR. SCHWARTZ:

Q. Now, Mr. Sloane, on the basis of your qualifications, are you prepared to give opinions as to the policies and effects with respect to racial discrimination of federal government agencies?

A. Yes, I am.

Q. Could you tell us which agencies you are prepared to testify on?

A. The Federal Housing Administration and its sister agency, the Veterans Administration, which operates a loan guarantee program very similar to FHA's mortgage insurance program, the Public Housing Administration, the various federal financial regulatory agencies.

Q. How many are there of those?

A. There are four.

Q. And turning first to the FHA and the Veterans Administration, do you have an opinion as to whether policies of those two agencies have contributed to today's racial residential separation in the urban areas of this country?

A. Yes, I do.

Q. Would you give us that opinion, specifying the policies involved and the reasons for your opinion?

A. I believe FHA and VA, particularly FHA, have been formidable factors in developing and creating the patterns of racial residential segregation that exist in urban areas today. The FHA was created in 1934 as part of the federal government's first major involvement in housing. At the time it was established, housing discrimination and segregation were already fairly clear. FHA represented the federal government, and had an opportunity to alter these practices and, instead, FHA became the leading exponent of housing discrimination and housing segregation.

Q. Can you give us roughly what time this was?

A. FHA was created in 1934, and from the very beginning it was the leading exponent of housing discrimination.

Q. Can you tell us how that was reflected?

A. It was reflected, for one thing, in the concrete form through instructions that FHA gave to its underwriters, telling them about the various factors that they should consider in appraising property for potential

FHA mortgage insurance.

Q. I show you Exhibit 228, and ask you to identify it, if you would?

A. This is an excerpt from the FHA Underwriting Manual, effective June 1, 1935.

Q. I show you some additional pages from that, and can you identify these pages, are they from the same document or from a different document?

A. These are from the FHA Underwriting Manual, but I'm not sure of the effective date of that provision.

Q. Okay. Now, you have referred to provisions in the manual. I show you, of the 1935 pages, Section 310, and read to you the following under the general heading of Protection From Adverse Influences, I read to you Paragraph 310: "Important among adverse influences, beside those mentioned above, are the following: "Infiltration of inharmonious or racial or nationality groups; infiltration of business or commercial development or use, the presence of smoke, odors and fog; proximity to noisy or high-speed traffic arteries, to railroads and nuisances." Is that the kind of reference that you were making a minute ago?

A. Yes, it was.

Q. Okay. I show you, secondly, Section 951, relating to quality and excessibility of schools: "When considering the question of schools, distance to the schools should be related to the public or private means of transportation available from the location of the schools. The social class of the parents of children at the school in many instances have a direct bearing. Thus, physical surroundings of a neighborhood area may be favorable and conducive to enjoyable and pleasant living in its location. However, if the children of people living in such an area are compelled to attend school where the majority or a considerable number of pupils represent a far lower level of society or in incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist." Is that a provision of the kind you were referring to a minute ago?

A. Yes, it is.

Q. And can you tell us whether the FHA had any specific suggestions or made any specific recommendations for dealing with the problem of so-called racial incompatibility or inharmonious neighborhoods or the like?

A. Yes. The FHA strongly recommended the filing of racially restrictive covenants on property carrying its mortgage insurance. These covenants were meant to exclude minority group families. In fact, the FHA's espousing racially restrictive covenants was in large part responsible for its great popularity in the 1930's and 1940's.

Q. I show you Section 284(3) of the manual, and I would like to read 284(3)(f) and (g) --

THE COURT: Excuse me. Is this the same manual of 1935?

MR. SCHWARTZ: Both in 1935 and as revised within the next couple of years.

THE COURT: We are still in the '40's?

MR. SCHWARTZ: In the '30's, your Honor, as far as the manual is concerned. This, of course, governed FHA financing until changed, and I will get to the question of change in a little while, your Honor.

BY MR. SCHWARTZ:

Q. 284(3): Recorded deed restrictions should strengthen and supplement zoning ordinances, and to be really effective should include the provisions listed below: The restrictions should be recorded with the deed and should run for a period of at least twenty years. Recommended restrictions including the following," and there is (a) through (e), and I jump to (f): "Prohibition of nuisances or undesirable dwellings, such as stables, pig pens, temporary dwellings and high fences. (g): Prohibition of the occupancy of properties except by the race for which they are intended." Is that the kind of covenant to which you were referring?

A. Yes.

Q. Now, would you tell the Court how the Veterans Administration operated in this area?

A. The Veterans Administration largely followed FHA's lead. It was created a good decade after FHA, and its policies were largely ones of neutrality, they never came out publicly with the kind of recommendations that FHA had, but they tended to follow FHA's lead, and they were created at about the time the FHA policy began slowly to change from one of zealous advocacy of racial discrimination.

Q. Can you tell us about that change, when it took place, what precipitated the change, and how, and the magnitude of that change?

A. The first change occurred after the end of the Second World War, in response to an increasing protest from Civil Rights groups and, finally, under some pressure from the United States Attorney General, FHA revised its manual slightly to substitute for the term "inharmonious racial groups," the term "inharmonious user groups." The change was one of form only.

Q. When did that change take place?

A. 1947. The change was one of form rather than substance. The first substance of change occurred following the United States Supreme Court decision in Shelley versus Kramer, which ruled that the courts could not enforce racially restrictive covenants. That decision came down in May 1948, and FHA close to two years later made almost a 180 degree change in its policy toward racially restrictive covenants. It held that it would no longer insure mortgages on property carrying racially restrictive covenants which were filed after February 15, 1950, and VA followed FHA's lead with the same policy.

Q. Now, can you give us an idea as to the proportions of residential financing accounted for by FHA and VA activities say during the '40's and '50's and '60's, if you know that?

MR. GREGORY: Your Honor, at this particular time may I offer an objection to the generalization of the question. After all, we are dealing with a situation that existed in the City of Buffalo in this case, and not generally. If the witness can testify with respect to the practices, more specifically the question asked by Mr. Schwartz just now, fine. I would like to offer an objection to the generalization of the question.

THE COURT: I will overrule your objection and permit the witness to testify.

THE WITNESS: During the late '40's and early '50's, FHA and VA activities, measured by their share of the market, was at its peak. At its peak it was something in excess of forty per cent of the single-family housing market. It declined considerably since these peak years, particularly in the '60's. The last time I checked, which was several years ago, FHA was down below twenty per cent of the market, and this was several years ago, and VA was lower. I understand more recently VA has come up in terms of its share of the market.

BY MR. SCHWARTZ:

Q. Now you testified that the FHA and VA changed their manual. Can you tell us how that change operated in practice, and how significant that change was in actual FHA and VA practice?

A. It was not very effective. First, the change in the language in the manual from inharmonious racial groups to inharmonious user groups was no substantive change at all. The change in policy on racially restrictive covenants to one of refusing to insure mortgages on property carrying such covenants was a substantive change, but what it really did was place FHA and VA in the position of neutrality. Neither FHA nor VA following this change of policy did anything to try to prevent builders and developers with whom they dealt from discriminating, and after more than -- well over a decade, close to two decades of zealous advocacy of racial discrimination, to switch to a policy of neutrality was worse than locking the barn door after the horse was out. They had fostered discrimination and segregation and now said, 'Do as you will', and discrimination continued unabated.

Q. Did the Commission ever bring -- strike that. Did the United States Commission on Civil Rights ever bring the matter of FHA policies to the attention of that agency?

A. Yes, we did, from the very time the Commission was created.

Q. When was that?

A. In 1957. We met on a continuing basis with FHA officials, calling this matter to their attention. We held a conference with FHA and other HHFA officials in Washington in 1959, calling FHA's past history of discrimination and current posture of neutrality

* * *

are 228, the understanding fair housing pamphlet is 294. We offer them both at this time.

THE COURT: We will have them both marked in evidence. I will consider arguments about relevancy and materiality later.

(Thereupon Plaintiffs' Exhibits 228 and 294, previously marked for identification, were received and marked in evidence.)

MR. SCHWARTZ: Your Honor, I think it is unnecessary to say that our silence in response to Mr. Gregory's various assertions is not to be construed in any way as agreement.

THE COURT: I understand.

BY MR. SCHWARTZ:

Q. Now, in light of all this, Mr. Sloane, do you have an opinion as to the impact of the FHA change in

policy on segregated housing that had resulted from
their prior policies, according to your testimony?

A. In my opinion it had no impact whatsoever.

Q. By the way, with respect to the restrictive covenants, after 1950 did the FHA seek to undo the restrictive covenants or take any action with respect to those mortgages, which it had financed, containing restrictive covenants prior to that date?

A. No, it routinely insured mortgages on property carrying racially restrictive covenants, if the covenants had been filed of record prior to February 15, 1950.

Q. Now, Mr. Sloane, if we can talk about the Public Housing Authority. Do you have an opinion as to the relationship between residential housing segregation and policies of the Public Housing Authority and its predecessors and successors in office?

A. Yes, I do.

Q. Would you give us your opinion and the bases for that opinion?

A. I believe the Public Housing Administration and its successors were as formidable a factor as FHA in establishing residential segregation, particularly in the cities of this country.

Q. As formidable, you mean as significant in contributing to that?

A. Yes, but in a somewhat different way, but still as formidable. Different because it had a more selective clientele with which it was dealing. The Public Housing Administration at the outset had a somewhat different policy from that of the FHA. FHA's policy was outright discrimination and insistence on segregation. The Public Housing Administration, which began in 1937, its policy was, first of all, to insist that minority group people got their fair share of public housing, which FHA had never insisted upon at all. However, as far as the Public Housing Administration was concerned, local public housing authorities were free to provide public housing on a racially segregated basis if they chose to do so, and almost without exception, they did choose to do so and --

Q. Is that in all regions of the country, on the basis of your studies in the Commission?

A. Yes, it is, and this policy of hands off, although insisting on racial equity, as they called it, persisted until approximately 1962, when the executive order on equal opportunity in housing was issued, and during that period of time, a period of twenty-five years, roughly seven hundred thousand low-income housing units were provided, almost all of them on a racially segregated basis, and these helped to establish and firm up racial residential patterns which, once established, just perpetuate themselves.

Q. Is it your judgment, on the basis of the work of the Commission and your work that the Public Housing Authority knew of the consequences of this policy of leaving the matter to local initiative?

A. Yes,they certainly did. First of all, they received statistical data on race, which showed them what the racial composition of each project run by local housing authority was.

Q. Can you tell us the relationship, the functional relationship, between the Public Housing Authority and these various public housing projects in units?

A. The projects are financed entirely through annual contributions which are paid by the Federal Public Housing Administration, and every action and every step of the public housing process must be approved

* * *

these policies, practices and the like, were anything but uniform throughout the country?

A. With minor variations, no.

Q. Now, do you have an opinion as to how long it will take to undo the discriminatory and segregationist effect of the policies and practices that you have described?

A. Well, it depends. If the federal agencies could turn around 180 degrees, by that I mean match the zeal, with which they carried on the discriminatory policies in the '30's and '40's, with a similar enthusiasm in carrying out equal housing opportunities and obligations, I would estimate two to three generations. At the rate they are going now, which is essentially a passive attitude toward their enforcement responsibilities, a much, much longer time. I couldn't estimate at all.

Q. Do you have an opinion as to the link between residential segregation and segregated schools?

A. Yes.

Q. Would you give that to the Court, please?

A. Very, very strong. In view of the pattern of neighborhood schools, in particular the pattern of racial residence these inevitably to a segregated school, too. We had situations in many parts of the country where entire communities are almost virtually all white, so that all schools, whether neighborhood or not, tend to be attended on a raciall segregated basis.

MR. SCHWARTZ: Thank you, Mr. Sloane. Your witness.

CROSS EXAMINATION BY MR. PANFIL:

Q. Mr. Sloane, you have testified to the link between racially segregated housing and racially segregated schools. Could you tell me which is the cause for the other?

A. The impact on one another, from my vantage point, generally has been housing. The most obvious cause would be housing, segregated housing causing segregated schools.

Q. I see. We have two exhibits here, which refer to population, Number 289 and 290. They show within the span of years from 1930 to 1970, based upon federal census, a dramatic rise in the number of nonwhites within the heart of the City --

* * *

(Thereupon the court was in recess at 11:40 a.m.)

* * * * * * * *

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 11:55 A.M.

MR. GRIFFIN: Mr. Service, please.

CLEON O. SERVICE, called as a witness on behalf of the Plaintiffs, and having been previously duly sworn, resumed and testified further as follows:

MR. GRIFFIN: I had concluded my direct examination last week, so you may inquire, gentlemen.

CROSS EXAMINATION BY MR. PAMFIL:

Q. Mr. Service, did you ever record any complaints with

* * *

Q. In the '30's you were not in fact dealing with real estate?

A. Not as a businessman, no, I testified that my father at that time was involved. I was working with him and with the organization that he was working with, in trying to --

THE COURT: Mr. Service, how old are you now?

THE WITNESS: Fifty-seven.

BY MR. GREGORY:

Q. What was your connection with real estate in the '30's then?

A. My father was a broker, a realtor, and a member of an organization, a taxpayer's organization, which was working, trying to solve the problems of the black families, and tried to find housing for them.

Q. In this connection then did you become familiar with real estate practices and real estate patterns?

A. Yes.

Q. This would date back to the '30's?

A. That is correct.

Q. Did your testimony the other day suggest that in the

* * *

was from 2.7 to 24.3 per cent?

THE WITNESS: That sounds like it fits the facts that I have observed.

THE COURT: Okay. Thank you.

MR. GRIFFIN: Thank you, Mr. Service.

(Witness excused.)

MR. GRIFFIN: Your Honor, I have just one more witness for today, Mr. Goldfarb, on a couple of short matters, and that will conclude our witnesses for today.

THE COURT: Fine.

NORMAN GOLDFARB, called as a witness on behalf of the Plaintiffs, and being first duly sworn, testified as follows:

(Thereupon document was marked Plaintiffs' Exhibit 296 for identification.)

DIRECT EXAMINATION BY MR. GRIFFIN:

Q. Mr. Goldfarb, you have assisted in collecting any number of documents which have been marked and offered in evidence and for identification in this case, is that right?

A. Yes, I have.

Q. Is one of the documents that you have secured a report by the Buffalo Municipal Housing Authority of November 1961, relative to the Ellicott Relocation Objectives, Experience and Appraisals, is that correct?

A. Yes.

Q. Within this exhibit is there a small census tract map, which shows where ninety-nine of the families from the Ellicott District were relocated?

A. Yes, it does.

MR. PANFIL: Can you give us the exhibit number?

MR. GRIFFIN: Yes, 230. I would offer this census tract map in evidence as Exhibit 230.

MR. PANFIL: It is a little illegible, would you tell us what it says in the left-hand corner?

THE WITNESS: It says, "Seven census tracts receiving"-- as I read it --"ninety-nine per cent of relocation of families, Ellicott Redevelopment Project," and at the bottom, Municipal Housing Authority, which is the agency through which this report -- this particular sheet comes from, issued the total report.

MR. PANFIL: Would you again give us the source, what publication it came from and the date?

THE COURT: Would you do that, Mr. Griffin?

MR. GRIFFIN: Yes. I took it out of this report of the Ellicott Relocation of November 1961 of the Buffalo Municipal, and rather than offer the entire report, I'm just offering this particular map out of it.

MR. PANFIL: All right. A report prepared by whom?

MR. GRIFFIN: By the Buffalo Municipal Housing Authority. Any objection?

MR. PANFIL: I have no objection.

THE COURT: Mark it in evidence.

(Thereupon Plaintiffs' Exhibit 230, previously marked for identification, was received and marked in evidence.)

BY MR. GRIFFIN:

Q. One last subject, Mr. Goldfarb. You have been interested in the matter of integrating the Buffalo Public Schools for years, correct?

A. Yes, sir.

Q. You have told us that you wrote the letter of December 1971 to the Commissioner, and then the Commissioner said that triggered renewed activity on his part in January 1972. Did you participate, by appointment, earlier on the Citizens Advisory Committee for the Board of Education?

A. Yes. In 1967 it was called the Advisory Council on Integration.

Q. Would you tell us how that came about, who appointed you, what its functions and duties were, and generally describe what it did?

A. I received an invitation to become a part of that council from Donald Lang, the coordinator of integration at that time, who told me that Dr. Manch, the School Superintendent, was looking for citizen input into various ways to desegregate the schools and, as I recall it, he was required, that is, the Board of Education was required to submit a report sometime in the late fall of 1967, indicating additional devices and ways the Board of Education was going to use to desegregate the schools, and I agreed to serve on the council, and attented meetings, as I recall, in August and September of 1967 and, perhaps, early or late October also.

Q. How many persons from the community served on that advisory committee appointed by the Superintendent?

A. I think there were seven or nine. I could name some of the organizations represented if you like.

Q. Tell us, so we can get an overview of the advisory committee.

A. There was myself, I represented the Citizens Council on Human Relations; Daniel Acker represeted BUILD; Shirley Arnold represented the Urban League; there was a representative from the Buffalo Teachers Federation, I don't recall his name; Sylvia Coles represented the Citizens for Better Education, I believe that was the name of the organization; and if I'm not mistaken, Joan Bozer also served on that committee, and I believe she represented the League of Women Voters at that time. I'm not altogether sure of that.

Q. And --

A. There were others. Dr. Jerome Barto, who I think at that time had left the State University College and was then an employment executive of the New York Telephone Company.

Q. Did the Advisory Committee meet on a number of occasions and receive expert information as to ways and means of desegregating the Buffalo Schools?

A. We did not receive any information at all from the School Department nor Mr. Lang. We were oriented as to our mission by Dr. Manch at the first meeting, and he described the problem, and he stated that within the Board's policy at that time, which was that only blacks would be bused from their neighborhoods to white schools, not reversed, there was a space problem, that a report was to be made to the Commissioner of

Education, and he sought our help in devising means to further the desegregation of the Buffalo Public School System.

THE COURT: What year is this?

THE WITNESS: 1967. In August of 1967, I believe, our first meeting was held. It may have been late July.

BY MR. GRIFFIN:

Q. Did the Advisory Committee come forward with a report with recommendations?

A. Yes. Each of the organizations there represented submitted their own proposals, and these proposals were discussed, and then those selected were amalgamated into a final report, and there were twenty-eight proposals which we submitted to Donald Lang and Dr. Manch. As I recall it, we went to Dr. Manch's office and gave him the final proposals, and they were in written form.

Q. When was that, what date?

A. I believe it was in the fall of 1967, perhaps October or around there.

Q. Now, we have had among our material that Advisory

Committee report, is that correct?

A. Yes, I believe there was the final report and that report submitted earlier by the Citizens Council on Human Relations.

Q. That was given to Dr. Manch, one of the defendants in this case, the Superintendent of Schools?

A. Yes.

Q. We don't find it right now, but we will have it to be introduced next week, that Advisory Committee report, is that right?

A. I hope so.

Q. What was done with the report and twenty-eight recommendations by the Superintendent of Schools?

A. Well, we first learned about it, as to what his own recommendations were to the Board of Education, in the press. He never informed us directly what he had done with our recommendations, but as we read through his recommendations --

THE COURT: Excuse me. You said you had a meeting with him?

THE WITNESS: Yes.

THE COURT: Was there a representative number of your group there?

THE WITNESS: Oh, yes. We went as a group, and presented it, those who were present at the meeting.

THE COURT: Was an oral presentation made then?

THE WITNESS: We gave him a written copy of our proposals. Of course, Donald Lang, the coordinator of integration, had a copy. There were many copies, and we gave the copy to Dr. Manch personally, directly. If I'm not mistaken, Daniel Acker of BUILD was the Chairman of the group, and he submitted it to Dr. Manch, who accepted it, thanked us for our services, and we had no communication with him after that until we read his own recommendations --

MR. PANFIL: Your Honor, I object to this. It is unnecessary and far removed hearsay. He is testifying as to what he learned from the papers about a certain thing. Dr. Manch is available to testify and tell us.

THE COURT: Overruled.

THE WITNESS: Of all of the recommendations which we had made, which number twenty-eight, I believe, Dr. Manch recommended one to the Board and that recommendation had to do with communicating with the City Commission on Human Relations, forming a liaison with them to educate the people of Buffalo as to the need for the desegregation of schools.

BY MR. GRIFFIN:

Q. This was an advisory committee that was brought into existence by Superintendent Manch so that he could report on progress to the Commissioner of Education, is that correct?

A. To have input from us as to additional means to desegregate the schools.

Q. And would you tell us in a general way what some of the major recommendations were of the twenty-eight specific recommendations?

A. I recall several. The use of portable classrooms was one, the cross busing was another, a recruitment program, I believe, for minority teachers, and investigation of the fantastic turnover of teachers in black schools, an educational park in cooperation with the suburbs, working with suburban communities to invite black students out to the suburbs, and many others, totaling twenty-eight. Oh, a principal plan, which we thought could be used immediately was to use pairing of schools to cause instant integration in all-black and all-white schools which were closely together geographically, such as 4 and 34, 17 and 56, 16 and 30, 18 and 38. On the latter, I'm not quite clear. There were a number of schools that would have been able to do this with a minimum of busing, certainly no cross busing, and if grades 1 through 4 were put in one school, and grades 5 through 8 in another, the all-white and all-black schools would be integrated when that was done.

Q. Now, you said of the twenty-eight recommendations -- we will have the report to offer later -- the only one that you learned of that the Superintendent recommended to the Board was that relative to something about the Division of Human Relations or something like that?

A. That is correct.

Q. Just so that it is clear, you did say that one of the recommendations was the portable classrooms, and we have learned that at some later date or at sometime portable classrooms were installed, how did that come about?

A. Well, we protested Dr. Manch's report to the Board of Education. The Board of Education gave the Council an opportunity to be heard on all of its recommendations and the reasons why we felt Dr. Manch's recommendations were inadequate and just would not do the job. But we were not persuasive and the Board of Education generally followed Dr. Manch's recommendations, and certainly didn't adopt those that I have enumerated here that were in the report, and -- they didn't adopt any -- I think they agreed on the one that Dr. Manch adopted. So we resigned, we had resigned by the time we had the meeting with the Board of Education in protest, and we turned to Dr. Allen, after the report was sent in 1968 by the Board of Education saying what they were going to do for the future, and we pointed out to Dr. Allen that while the Middle School Program -- I believe that was in the 1963 report -- was all right for ten years hence, there was nothing that the Board of Education was going to do at the moment, and we told Dr. Allen about the portable classroom idea, and sometime after our meeting, sometime after the Board of Education received its report -- I'm sorry -- published its recommendations, and after we had communicated with Dr. Allen, I received a call from Donald Lang, and he told me that the Board of Education had received a letter from Dr. Allen asking what they were going to do in the interim, pointing out that the program was satisfactory perhaps long range, but what were they going to do in the interim. So the interest in the portable classrooms apparently had been revived because of that. Donald Lang asked me to give him the same information I had presented when I introduced the portable classroom idea, with respect to costs, and the cost estimates that I had came from Dewey Builders, Inc., I believe, and I had made the inquiry of them when I got the idea teaching at the University of Buffalo, because we were teaching in what was then a temporary building, and it was more than adequate for educational needs, and that is how it got to be suggested.

Q. I just wanted to explain that situation. Now, lastly, do you have the Model Cities application?

A. No, I left it there on the bench.

Q. Is there a section in Exhibit 260 relative to the Model City application, which deals with the longevity, in light of age, date of construction and condition, of a large number of the physical school buildings that serve the elementary school population of the City of Buffalo?

A. I couldn't find it.

Q. All right.

A. But I have been told that it exists in the Model Cities application, and in my brief looking, I was unable to locate it.

Q. If such as section exists in Exhibit 260, it would be under what section or part of the treatment?

A. I have been unable to find it, Mr. Griffin.

MR. GRIFFIN: All right, you may inquire.

* * *

MR. GREGORY: All right, that is all.

REDIRECT EXAMINATION BY MR. GRIFFIN:

Q. I just noticed, Mr. Goldfarb, so we have it in the record, that in Paragraph 3A of the complaint it is alleged that the individual plaintiffs, and that would be George Arthur, Norman Goldfarb, William and Wilhelmina P. Seales and John Medige are parents of children attending public schools in Buffalo and Buffalo suburbs. I noticed that in the answer of the defendant City they state they lack knowledge or information sufficient to form a belief. Are you able to tell us whether Mr. John Medige, the plaintiff herein, has children in the Buffalo Public Schools?

A. Yes, I believe he does. The last I knew, he had children in Bennett High School and in the lower grades.

Q. And Mr. and Mrs. Seales, are you able to state the situation as far as they're concerned?

A. They have one son in Bennett, and one son in School 22.

Q. And the plaintiff George Arthur?

A. George Arthur I believe has one child in the Buffalo Public School System today.

* * *

(Plaintiffs' Exhibits numbered 297, 298, 299, inclusive and respectively, marked for identification.)

MR. SCHWARTZ: Dr. Clark.

KENNETH B. CLARK (17 Pine Crest Drive, Hastings-on-Hudson, New York), a witness called by and in behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. SCHWARTZ:

MR. PANFIL: May it please the Court --

THE COURT: Yes, Mr. Panfil.

MR. PANFIL: I had two witnesses who I had ready for this afternoon. I spoke with Mr. Schwartz and he has asked if I couldn't present them at a time when Mr. Griffin would be here to cross examine them because basically, their testimony will be on housing. I would just like to know what the situation will be so I can call them at the first break and let them know.

* * *

THE COURT: Mr. Panfil, call them and tell them not to come this afternoon, but to stay in close touch.

MR. PANFIL: Thank you, your Honor.

MR. SCHWARTZ: Thank you, your Honor, very much.

THE COURT: All right.

BY MR. SCHWARTZ:

Q Dr. Clark?

A Yes, sir.

Q What is your present occupation, Dr. Clark?

A I am Professor of Psychology.

Q Where do you teach?

A At the City College, the University of the City of New York.

Q What is your specialty within the area of psychology?

A Social psychology.

Q And in that context, in that work, do you deal with education and problems of education and growth?

A Yes. Most of my research in the field has been in the general area of culture and personality, which includes education as a very important part of the total culture.

Q And you are also a member of the Board of Regents of the State of New York?

A. I am a member of the Board of Regents of the State of New York and I am also president of the Metropolitan Applied Research Center in New York City.

Q What kind of work does the Metropolitan Applied Research Center do?

A. Research, analysis and the use of social science research as an instrument in seeking to affect social change.

Q And much of this social change relates to problems of discrimination?

A. Discrimination in education, municipal services.

Q And, Dr. Clark, how long have you been a member of the Board of Regents? Is it about 1967 or '68?

A. Yes, about seven or eight years. I think I am in my eighth or ninth year. I am not sure.

Q How long a term is that, incidentally?

A. My present term?

Q Yes.

A. I was first elected to fill out a five year term.

Q I see.

A. And then when that term was up for some reason, the State Legislature re-elected me for a 15 year term, which I think is too long.

Q So, in other words, you are going to be around for quite a while then in that capacity?

A No. I think the law makes clear that at the age of seventy, you must retire and I think that is a very good law.

Q Now, during the course of your work, both as a psychologist, teacher and a member of the Board of Regents, you have been concerned professionally and otherwise with problems of school integration and discrimination in the schools?

A Yes. Indirectly since 1940 and rather directly since 1951.

Q Okay. Could you tell us briefly but in as much detail as you think appropriate the kinds of things that you have been doing since 1940 in this area, the projects you have been involved in, studies you have done and other indications, other involvements that you have had.

A Well, in 1940, my wife and I conducted some research on the effects of prejudice.

Q Racial prejudice?

A Racial prejudice, discrimination and segregation on

* * *

A. Oh. Well, since the Brown decision, all of my professional and personal life, it seems to me, has been consumed by this issue. Last year, Professor Murdahl invited me to collaborate with him on an updating and revision of the American Dilemma and I started that.

Q I see, and you have independently of that written a great many books in this field. I know Dark Ghetto and others. Through an oversight, I forgot to ask Dr. Clark for a copy of his vita. I should like to obtain one and submit it at the close of the case. Now, Dr. Clark, let me turn to the policies of the Board of Regents of the State of New York. Could you briefly summarize for us what those policies are at this time?

A. Yes. As of this time - -

Q With respect to the issue of integration of the schools.

MR. PANFIL: May I, at this time, your Honor, offer an objection. We have the policy statement of the Board of Regents and it is more than extremely lengthy, in evidence, and I think it is the best evidence and should stand.

THE COURT: I will consider that, certainly, Mr. Panfil, but I will overrule the objection and permit Dr. Clark to orally tell us what his impression is of the Regents policy.

THE WITNESS: The Regents, - the Board of Regents of the State of New York has issued a series of policy statements on the matter of the positive educational advantages of racially balanced schools. These policy statements go as far back as, I think the late 1950's when the Chief Executive Officer was the late Commissioner James Allen. Before I was a member of the Board of Regents, I worked with Commissioner Allen in preparing some of these earlier statements which the Regents adopted. The Regents has, - the Board of Regents has repeated such statements. I think the latest one was about two years ago when the then Governor Rockefeller made a challenge to the Board of Regents on the matter of busing and publicly asked the Board of Regents to reconsider its policy statements on this matter and at the very next meeting, the Board of Regents reaffirmed its position on the advisability, the desirability, the educational imperative of racially desegregated schools. I don't think that particularly endeared them to the ex-Governor, but it was, to my mind, one of the last clearly positive courageous acts of that august Board.

BY MR. SCHWARTZ:

Q Well, you say "one of the last" - -

A Well - -

Q "Clearly courageous acts".

A Probably that was gratuitous.

Q Okay. Dr. Nyquist, in his testimony here, indicated that there are some scurryings in the Board on this issue and that the policy might indeed be reconsidered. Do you have any judgment or view about that?

A. Yes.

MR. PANFIL: Your Honor, if I may object at this time to the witness announcing or offering an opinion here in our case right now.

THE COURT: Mr. Schwartz, if we started to deal in speculations about what the Board may or may not do, Mr. Clark, or Dr. Clark is a member and I am willing to listen to what the policy is now, but it certainly is clearly speculation about what they may do a month from now and if they do something a month from now and this matter is still open, we could certainly consider it.

MR. SCHWARTZ: Well, I am going to ask him if there had been any conversations respecting any possible changes and whether views have been expressed.

THE COURT: Have there been any meetings about it?

MR. SCHWARTZ: Yes. I mean there was a meeting this September and there have been other meetings.

THE COURT: Meetings at which the Board met to reconsider this problem?

THE WITNESS: Meetings of the Board are not devoted to any single item.

THE COURT: I know that.

THE WITNESS: Yes, there have been meetings in which this matter has been discussed, yes.

THE COURT: On the agenda, right?

THE WITNESS: Yes. I am not sure whether - -

THE COURT: In other words, Dr. Clark, it seems to me that we have a policy statement now which is important to know and understand. I realize in any body whether it is the Board of Regents or the City Council that from time to time everything is being reviewed. You know, members may sit down over coffee or over dinner or meet privately and say "Well, we ought to reconsider this or reconsider that", but if, in a situation like this, we consider, we hear all of that, Number one, we would never end, and actually a lot of these things may never come to pass, so, Mr. Schwartz, I do not think it is of any moment here what the Regents might do in the future. We have the policy statement.

MR. SCHWARTZ: Just that Dr. Nyquist raised it in his testimony that he would have to take that into account.

THE COURT: If there is something which is on the agenda now and you think it is important to bring out, we will listen to that.

BY MR. SCHWARTZ:

Q Well, this matter is on the agenda for the October meeting, is it not?

A Yes, it certainly is, yes. In fact, it was on the agenda for the September meeting, but the report was not ready.

THE COURT: Is there a motion by some member pending or is this in the nature of further study or is there some definite resolution there?

THE WITNESS: There was a resolution, your Honor, and I am not sure whether it was the June meeting or the July-August meeting, but there was a resolution for a reconsideration of the past racial balance policies of the Board of Regents and that resolution passed and a committee was set up for the purpose of reconsidering or re-examining.

BY MR. SCHWARTZ:

Q So that at the present time on the agenda of the next meeting, the possible reconsideration of this policy will be considered.

A That is not quite accurate, Mr. Schwartz.

Q Exactly how?

A At the present time, there will be a report - -

Q Yes.

A From the committee that was set up for the purpose of re-examining and reconsidering.

Q Has that report been filed yet?

A No.

Q So you don't know the contents of it?

A I do not know the contents of it, no.

Q Okay. Now, Dr. Clark, Commissioner Nyquist has been Commissioner of Education during most of your tenure on the Board, isn't that correct?

A No.

Q No, 1969?

A No. He has been Commissioner of Education only during the last two years.

Q I think he took office in '69, when Commissioner Allen went to Washington.

A Did Commissioner Allen go to Washington in '69?

Q Yes, he did.

THE COURT: Time goes by.

BY MR. SCHWARTZ:

Q He was the first Commissioner of Education?

THE COURT: 1969?

MR. SCHWARTZ: In the Nixon Administration, he was promoted.

THE COURT: When did you become a member?

THE WITNESS: '66 or '67.

MR. SCHWARTZ: Yes.

THE WITNESS: Gee, that is really surprising.

MR. SCHWARTZ: I know this because I have talked to Dr. Allen over the years.

THE COURT: Dr. Allen, - you came on in '66 - -

THE WITNESS: I am Clark , Dr. Clark.

THE COURT: You are Dr. Clark, but I mean Dr. Allen was there until 1969?

THE WITNESS: '69, yes.

THE COURT: And since that time, Commissioner Nyquist. All right, Mr. Schwartz.

BY MR. SCHWARTZ:

Q Thank you, and during that time, have the Board of Regents been concerned about the pace of integration in the schools of Buffalo?

A. Not as much as I have been.

Q. Has the Board of Regents expressed an opinion to Dr. Nyquist; have they discussed it with Dr. Nyquist have you discussed it with Dr. Nyquist in your capacity as a Regent?

A. Mr. Schwartz, I think it is important to make a distinction between the two parts of your question.

Q. Okay.

A. I have been concerned. I have raised it. I have discussed it with my colleagues on the Board of Regents and in the meetings of the Board of Regents I have discussed it with the Commissioner. I have assiduously refused to discuss it with the Commissioner outside of the meetings and I think that is a very important point in - -

Q. Okay.

A. Terms of maybe my overliteral interpretation of the right of the Commissioner to independent action in his quasi-judicial role, so I absolutely refused, even in joking, to talk with the Commissioner about this very important issue outside of the actual meetings of the Board of Regents. Now, if it is clear that most of these discussions have been at my irritating initiative and have not been the spontaneous concern of my colleagues on the Board then I can answer your question affirmatively.

Q Yes. Well, have you expressed concern to Dr. Nyquist at these meetings?

A. Over and over and over again to the point where I have irritated my colleagues and irritated, - and, you know, made a nuisance of myself and I think the record in terms of my correspondence with the Commissioner and with my colleagues, copies of which I have sent to my colleagues are clear on that matter.

Q What have you said to him, specifically, if you will tell us?

A. That we are permitting local School Boards to defy the Constitution of the United States, the laws of the State and the directives of the Commissioner with impunity. I have said that aside from the issue of racial segregation there is this very important issue of the defiance of law. You know, a breakdown in the respect for law and that as the highest educational governmental body, we should not and must not permit that to happen and the response generally is that I am not particularly realistic.

Q Could you be a little more specific about Dr. Nyquist's response elaborating what you think he meant by that and what he actually said?

A I really don't know what he meant by that and I didn't say he said that.

THE COURT: Wait a minute, excuse me, Mr. Schwartz.

MR. PAMFIL: We are going into an area of hearsay, your Honor, where the witness is going to be asked - -

THE COURT: Mr. Schwartz, if this is important, it seems to me that we have the records of the Regents, which you could, - the minutes, and I think that is what is important here.

MR. SCHWARTZ: We don't have minutes of the Board of Regents.

THE COURT: You could certainly make them available very simply.

MR. SCHWARTZ: Not of discussions, your Honor. I don't even know that those things exist, and the Board of Regents, - We have minutes of the Board of

Education of the City of Buffalo.

THE COURT: I am sure the Regents would keep records of their meetings like any other group, don't they?

THE WITNESS: No, your Honor.

THE COURT: They don't?

THE WITNESS: The official minutes of the Board of Regents consists only of the official actions taken in the public meetings. They do not consist of the discussions which occur in so-called committee of the whole.

THE COURT: Very well.

MR. PANFIL: The only thing is, your Honor, I would like to lay a blanket objection with regard to the opinions and conclusions or state of mind of other members of the Board.

THE COURT: I think what we ought to hear is only the conversations at the meetings that you can recall and I think, as far as if time is important here, that we ought to have the time spelled out as carefully as possible.

Mr. Schwartz.

BY MR. SCHWARTZ:

Q Yes. Now, in these conversations with Dr. Nyquist, can you recall any one in particular and what he said to you and what you said to him about this issue?

A Well - -

Q For example, when was the most recent time you spoke to him about this at a meeting?

A I think two meetings ago.

Q Which would be when?

THE COURT: Or about when?

BY MR. SCHWARTZ:

Q Or about when?

A We have, - we don't have, - the one month in which we don't have a meeting is August and I think that at the July-August meeting was one of the more intense discussions of this matter. Now, in the September meeting, we discussed the question of the report that was supposed to be ready for us from that committee at that time and all we discussed at that time was that it was not ready.

Q Yes. Now - -

A Now, in the prior meeting, there was a disturbing discussion.

Q And can you tell us about that discussion?

A Yes. I must tell you because I am under oath, the thing that was most disturbing about that discussion was the fact that the majority of my colleagues on the Board of Regents felt that it was desirable and that it was not at all improper to ask the Commissioner to withhold any attempt at enforcement of existing orders and to refuse to grant any further orders until such time as the report of the Committee that was appointed to re-examine the policy statements reported.

MR. PANFIL: Your Honor, within the area, - excuse me, Dr. Clark. I hate to interrupt you, but we are in the area of what was felt by a majority of his colleagues.

THE WITNESS: No, this was voted.

THE COURT: That was voted?

THE WITNESS: That was voted.

THE COURT: All right.

THE WITNESS: I can speak for myself. I was vehement in my opposition to this. I respect my colleagues, but I stated as intensely as I could that this was an invasion of the quasi-judicial powers of the Commissioner. I reminded the Chancellor that in my vehement opposition of the Commissioner's order on the District 18 matter in New York City, I waited until he had given the order, until I read it and then I raised the question of my personal judgment that this was in contradiction or inconsistent with our existing policy statements and I reminded the Chancellor that at that time when I wanted to discuss the consistency of the Commissioner's order in District 18 with existing Regents policy statements, the Chancellor said to me that that was improper and he said to me that the Commissioner's directives could not be discussed even. In that July meeting, when the issue of the Board of Regents asking the Commissioner not to enforce existing orders or not to give any new orders, I said to my colleagues and to the Chancellor, "This I consider bordering on a totally unacceptable interference with the quasi-judicial role", but as usual, I got nowhere.

THE COURT: Excuse me, Mr. Clark. You speak of the Chancellor. Will you explain for us, please, who the Chancellor is and what his function is with the Board of Regents?

THE WITNESS: The Chancellor is somewhat like the Chairman of the Board and he is elected by the Regents and he presides over the meetings. He has the power of making the kinds of decisions which I just stated. He has the power of making nominations, not nominations, - appointments to the committees of the Board. He is generally elected because of respect and the present Chancellor is highly respected, a highly respected person.

THE COURT: Can you tell us who he is, please?

THE WITNESS: Joseph McGovern. He is a lawyer practicing in New York City.

BY MR. SCHWARTZ:

Q Could I take you back beyond that to conversations or discussions had with Commissioner Nyquist by the Board of Regents relating to the pace of integration, particularly in Buffalo? Can you recall a specific meeting within a period of months or a year when you or another Regent raised that question with Dr. Nyquist?

A Mr. Schwartz, I have, - I raised that question with my colleagues and the Commissioner so often that if I were someone else looking at me in my relationship with my colleagues, I would say "ad nausium".

Q Can you tell us - -

A I raised it all the time and I write it and I say, "Look, we cannot afford to be a laughing stock".

Q Then can you tell us if you remember, any specific time when Dr. Nyquist specifically responded to that at a meeting of the Board of Regents and what, as close as you can recall, he said?

A I can't pull out any specific times because, you know, we are involved in this discussion all the time, as far as I am concerned. I sometimes want to get the record, - get it on the record so I will be irritating by putting it in writing, you know, and I will write long letters to the Commissioner. I will send copies to my colleagues and occasionally, I will get a response.

THE COURT: Excuse me, Dr. Clark. We are concerned here in this case with the Buffalo problem. Did you write to him or the Regents about the Buffalo problem in particular?

THE WITNESS: I, - I, - in many of my correspondence, I sometimes listed all of the directives that were being ignored and always high on the list would be Buffalo. In fact, Buffalo - -

THE COURT: Could you be more specific or concrete about what you said about Buffalo and what the response was?

THE WITNESS: Your Honor, to the extent, - I can be specific to this extent that I many times mentioned Buffalo as a long standing and probably the longest standing example of a Commissioner's directive being defied, starting with Commissioner Allen. I recall saying this. I do not recall at any time talking about Buffalo alone.

THE COURT: I see. The matter of Yerby against Dixon, as I recall, that was - -

MR. SCHWARTZ: Yerby Dixon vs. the Commissioner.

THE COURT: Yerby Dixon, I am sorry. As I recall, that came down as a ruling before you came on the Board. Can you remember any discussion about that and the implementation of the directive there of the Regents to the Board in Buffalo, specifically?

THE WITNESS: I recall even before I was a member of the Board talking with Commissioner Allen about that, sharing with him my impressions on visits to Buffalo and discussions with Superintendent Manch and this goes back ten, twelve years.

MR. SCHWARTZ: 1965.

THE WITNESS: And getting from Commissioner Allen his impressions of the difficulty of the Buffalo situation and also getting from him impressions that it has to be pursued, you see.

THE COURT: Mr. Schwartz, if you have more definite information, as you see, that is what I would like to bring out, rather than the general - -

MR. SCHWARTZ: I am trying to get a response from Dr. Nyquist, but let me indicate, let me ask you if you recall Exhibit 297 which is a statement by you to the Board of Regents dated September 17, 1973?

THE WITNESS: Yes.

BY MR. SCHWARTZ:

Q And this was a statement growing primarily out of the New York City situation, is that correct?

A Right.

Q And in this statement in which you were concerned about his ruling, you stated the following, isn't this correct, "The Commissioner in handing down this ruling probably took into account the fact that his prior orders to such communities as Buffalo and Newburg for the development and implementation of serious systematic school desegregation plans were ignored with impunity"?

A Right.

Q "In any event, Commissioner Nyquist has failed to use his powers or to explore the extent of his powers as Commissioner to deal affirmatively with these and similar acts of deliberate defiance of earlier desegretion orders". You wrote that as a member of the Board of Regents?

A I wrote that as a member of the Board of Regents. I distributed it to my colleagues and I asked that it be used as a basis for a series of realistic discussions of a matter of defiance of law.

MR. SCHWARTZ: I would like to offer this.

MR. PANFIL: No objection, your Honor.

THE COURT: No objection. Mark 297 in evidence, please.

(Plaintiffs' Exhibit Number 297 received in evidence.)

BY MR. SCHWARTZ:

Q Now, Dr. Clark, I show you Exhibit 298. That is a report by Dr. Nyquist to the Board of Regents respecting the state of his integration efforts in the State of New York, is that correct?

A Yes.

Q And was that sent to you by Dr. Nyquist in your capacity as a member of the Board of Regents?

A Yes.

Q Now, Dr. Clark, does this contain a page relating to the efforts respecting the City of Buffalo?

A Yes, it does.

Q Okay, and this was sent to you from Dr. Nyquist?

A Yes, it was.

Q It contains also information about efforts in other places like Huntington, Lackawanna and the like, is that correct?

A. Absolutely.

Q. Now, in this document relating to the report on the City of Buffalo, I should like to read to you and get your reaction to the following, "On April 6, 1972, the Board of Education of Buffalo was informed by Commissioner Ewald Nyquist that members of the State Education Department staff were to work with Buffalo School Officials to develop an appropriate desegregation plan for the school district. This action was taken because of the consistent failure of the Board to develop and implement a plan of its own".

THE COURT: Mr. Schwartz.

MR. SCHWARTZ: Yes.

THE COURT: Just read a little slower, please.

MR. SCHWARTZ: "The plan which was prepared by State Education Department personnel was submitted to the Buffalo Board on November 15, 1972 with a request that by January 3, 1973, the Board's reactions and suggestions be sent to the Commissioner. Subsequently, the Board of Education, in various responses to the Commissioner and Dr. Thomas Sheldon, Deputy Commissioner, rejected the plan in its entirety and more or less closed the door on any cooperative effort. In regard to further discussion of the State Education Department Plan, Board President Murphy stated to Dr. Sheldon that", quote "If your discussion with us should, in any way involve forced busing then, in view of the attitudes of a majority of the Board, there would be no point to such a discussion."

"Although a meeting was eventually held between Dr. Sheldon and Board members, the Board's reaction remained negative. Because of this impasse, the Commissioner was left no alternative but to order the

Buffalo Board of Education to implement a plan of desegregation prepared by the State Education Department. Accordingly, on August 2, the Division of Intercultural Relations submitted to the Deputy Commissioner two copies of a draft of a show cause order for desegregation of the Buffalo Schools. The order is currently in office of counsel. It embodies the essential elements of the study prepared by our staff in 1972. Meanwhile, Regent Genrich has been making an attempt to obtain cooperation of the Buffalo Board of Education."

Now, was this report ever discussed specifically at a meeting of the Board to your recollection?

THE WITNESS: Yes.

BY MR. SCHWARTZ:

Q With respect to Buffalo, if you recall.

A Well, the report in general was discussed. I don't recall that Buffalo was isolated.

MR. SCHWARTZ: Okay. I should like to introduce 298 in evidence.

MR. PANFIL: No objection.

THE COURT: Mr. Panfil, any objection to 298?

MR. PANFIL: No, your Honor. This is another letter?

MR. SCHWARTZ: No, no. It is a report by Dr. Nyquist.

MR. PANFIL: I have no objection.

THE COURT: All right. No objection. 298 may be received.

(Plaintiffs' Exhibit Number 298 received in evidence.)

BY MR. SCHWARTZ:

Q I show you also a letter from Dr. Nyquist to you dated October 23, 1973 in which he discusses the New York City matter, is that correct?

A I am sorry. Let me see it.

Q Yes. It is in response to a letter of yours, apparently?

A Yes.

Q And in that, - and this is a copy of the letter that you received and turned over to us?

A Right.

Q And in that letter, he refers to schools in the rest of the State, doesn't he, at the bottom?

A Yes.

MR. SCHWARTZ: I should like to introduce this in evidence.

MR. PANFIL: Is that 299? One minute, your Honor. No objection, your Honor.

(Plaintiffs' Exhibit Number 299 received in evidence.)

BY MR. SCHWARTZ:

Q Now, Dr. Clark, to conclude, could you tell us on the basis of your experience as an educator, as a psychologist and as a member of the Board of Regents, what is the impact of racial integration on children attending racially isolated schools?

A I think devastating, damaging.

Q Could you tell us in what way?

A In the case of the black children, the most concrete manifestation, of course, is low achievement. It reinfoces low self-esteem, awareness or the institutionalization of the rejection, you know, in the larger society and the need that all human beings have to compensate for a sense of rejection, a sense of personal inadequacy by a variety of what I might feel and call compensatory devices. That is, you know, smoke screen detections of ego such as aggression, hostility, escape, not being sure that the society's rejection is not justified and constantly testing this by sometimes self destructive action and all too infrequently positive overcompensatory defiance of the society's rejection of them. It is fairly obvious, the detrimental effect on the victims. What is not so obvious to me may be more insidious are the detrimental effects on the privileged.

Q In this case, the white children?

A The white children, who, by virtue of the institutionalization of racism in the segregated schools have unrealistic views of their own power. They do believe that by the virtue of accident of skin color, they have the right to be cruel and throw rocks, you know, fight. The society is not only teaching them, but reinforcing cruelty. Some of these children are guilty, feel guilty about it and react in their guilt by rebelling against their parents and other authority figures. Most of them acquiesce. Most of them accept the lessons of segregated schools and segregated society and perpetuate it. To me, this is built-in immorality. You know, this is establishing the base for the Watergate type mentality by having schools that should be institutions to liberate human beings, you know, to free them from petit constricting parochialisms, having them be the very instruments to reinforced tribalisms, barbarities, cruelties, and my argument with my colleagues on the Board of Regents is that we have left this matter to the Courts to deal with when we, as educators, have defaulted and we have come into the courts as advocates for the perpetuation of cruelty rather than going beyond the courts and saying if the society is to be morally more stabilized, we have to start with us, we have to start with the schools, and I admit, your Honor, that we don't win popularity contests that way, you know. I admit that when my colleagues say either directly or indirectly to me that I am being unrealistic that they may be right if you judge realism by referendum, but I don't know that that is the responsibility of people who are charged with that awesome role of governing education that we should be realistic. I think that we should help a society that is suffering from too much realism to be more humane.

MR. SCHWARTZ: Thank you, Dr. Clark. Your witness.

THE COURT: Before the cross examination, Dr. Clark, you have come to certain conclusions here and this is based upon many factors including your own experience and studies. Could you refer us, please, to specifically, - to studies which either you have been involved in or others who are knowledgeable in the field here that have made, - can you give us some examples of some studies which bear out your conclusions?

THE WITNESS: I am a little embarrassed, your

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CROSS EXAMINATION BY MR. PANFIL:

Q. I am your lawyer, Doctor. Doctor, could you tell us --

A. My friends always said I was a schizophrenic.

Q. Pardon?

A. I just said my friends always suggested I was somewhat schizophrenic.

Q. You lost me already, Doctor.

A. Splendid.

Q. I see. Is the Board of Regents a continuing organization, Doctor, or does it have a reorganization meeting periodically?

A. Do you mean in terms of officers and committees?

Q. Yes.

A. I am not too clear about that. I thought a colleague of mine who, - Regent Genrich was here. He is gone, I think.

Q. Let me ask -- I am not too clear really. The rules and regulations of the Board of Regents are really subject to the members of the Board and oh, here is Regent Genrich, and the first five years, the first three or four years I was on the Board of Regents it seemed to me that once we elected a Chancellor and demonstrated by our election of the Chancellor our

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behavior in every profession except law.

Q. Yes. Doctors, pharmacists, surveyors?

A. Absolutely. You name any profession that is licensed by the State of New York and it is the responsibility of the Board of Regents to see that minimum ethical and moral standards are maintained.

Q. What about --

A. I really don't see how our colleagues who have that responsibility can do it but they really are the work horses of the Board of Regents.

Q. I see. What about the problem with regard to the educational program of the state specifically aside from integration and segregation, what other matters do you deal with?

A. The Board of Regents in terms of statute and tradition is charged with what I think is the impossible responsibility of maintaining standards and quality in education in every educational institution in the State, public, private, parochial, elementary, secondary, collegiate, graduate, professional.

Q. I see.

A. And proprietary things. You know, we ought not ever to look at what we are charged with because we would all resign.

Q. And these are the things that come up at your meetings?

A. No, they don't all come up at the meetings because they are delegated to committees or to staff. The things that are likely to come up at meetings are those things in which there are problems. I mean, now, we are required to take certain actions. For example, all chartering actions go first to committees, the appropriate committee, whether it be elementary and secondary or the higher and professional and then they come to the committee of the whole and we take action on granting the charters, the disciplinary committee or the committee on discipline brings its findings to the committee of the whole and the committee of the whole respond. It is rare for the Regents as a whole ever to overrule one of its committees. It is very rare.

Q. Doctor, do you view this area of integration, this problem of segregation in the schools as one primarily of education or is it ancillary to your primary duties?

A. I am sorry. I don't understand the question.

Q. Well, the Board of Regents when it comes to education is basically concerned with the teaching of the three R's, let me say, reading, writing, arithmetic and standard disciplines in education, isn't this so?

A. Are you saying that the responsibility of the Board of Regents should be restricted to --

Q. No. I am asking you your concept, Doctor, the dissemination of education as charged to the Board of Regents under the Statutes of the State of New York, does that include the concept here of preventing segregation in the schools, or is this --

A. I don't think there is any question about it.

Q. You don't think there is any question about it?

A. That the Board of Regents is the body charged with the responsibility of governance of education in the State and there is no question that part of that responsibility has to be to see that laws related to education are not defied.

Q. Well now, we talked about, or I've heard you speak on direct examination about defiance of the laws of the State and the laws of the Constitution.

A. Yes.

Q. And the directives of the Commissioner of Education. Would you just expand on that a little bit for me?

What are the laws of the State that you feel have been defied?

A. Well, one of the things I found out when I was doing the research for the Brown decision cases in 1950, '51, is that New York State had laws prohibiting segregation in public education as early as 1841. I was shocked. Before emancipation, New York State had non-public school segregation laws. The argument which I used to irritate my colleagues with most, I guess, is the Brown decision.

Q. I see.

A. I say the Brown decision, its letter and its spirit we cannot see defied with impunity.

Q. So there we are talking about the Constitution, are we not?

A. I think that is very important.

Q. I do too.

A. Oh.

Q. I was just asking you with regard to any specific laws of the State of New York, Doctor.

A. The laws of New York State, as I understand them, prohibit segregated schools.

Q. I see, but, Doctor --

A. And certainly the laws of New York State cannot contradict the United States Constitution.

Q. I agree with you on that, Doctor. Is it possible the laws of New York State may go a little farther than required by the Constitution?

A. Positively.

Q. Positively they do, do they not? Doctor, there are two appendices in Exhibit 28. Would you take a look at them, please. One appears as Appendix A at Page 477, and that is a policy statement by the Board of Regents dated in 1967.

A. Yes.

Q. Now, that is followed on Page 497 by another policy statement of the Board of Regents. Do you see that?

A. Yes.

Q. Dated in 1968?

A. Yes.

Q. Are there others, Doctor?

A. I thought there were about four or five.

Q. I see. Are these the only two we can pinpoint at this time?

A. I would not trust my memory but it does seem to me as if, and I think in one of the letters I sent to my colleagues I probably snidely said that I thought that the past policy statements of lieu of enforcement.

Q. This is what I am getting at, Doctor. What did you tell the Commissioner to do? What had to be enforced? Is it what is contained in those two policy statements?

A. Obviously I haven't read these policy statements in that time since you have given them to me.

Q. I see.

A. Mr. Attorney, all I keep saying to the Commissioner is "Look, if you give a directive, the least you can do is to see that the directive is not flaunted, not ignored with impunity. It would be better not to give the directive", and it seems to me that is very simple.

Q. I see, Doctor.

A. Particularly if we are concerned with a society of law.

Q. One more thing. You talked about a quasi judicial powers of the Commissioner?

A. Yes.

Q. Would you tell me what that concept is in your mind?

A. I have often wondered. As I read the law on the matter of the powers of the Commissioner, and believe me, I keep reading it over and over again particularly when the Commissioner gives a directive that I don't like. I go to the laws and I read them and reread them and here is what I found, that it is a fact that the Commissioner is appointed by the Board of Regents. He serves at the pleasure of the Board of Regents. At anytime when the Regents believe that the Commissioner's actions are not consistent with their policies as they interpret them, - he has no contract, - the Regents can have a meeting and vote that the position of Commissioner is vacant, you know, and set up a search committee for another Commissioner.

Q. Thank you, Doctor

A. However, the law is clear that there are certain duties and responsbilities and authority which the Commissioner, once the Regents elect him, has and can exercise independent of the Regents or its action. Now, I don't know whether this is wise or not, but this is the law and that in, - interestingly enough, you could interpret the laws governing the authority and power of the Commissioner to say that even courts are restricted in terms of the extent to which the Commissioner's directives on educational matters, certain educational matters, are reviewable; that it has to be demonstrated that the Commissioner was arbitrary or capricious which I assume is easy or difficult to demonstrate, but he has certain independent powers and authority and the limit of his independence, as I see it in these areas only in terms of the Commissioner's decision that in the exercise of his independent powers they didn't like it a sufficient number of times to say "Okay, we have to get another Commissioner".

Q. I see.

THE COURT: Dr. Clark, could you give us some examples of where the Commissioner can exercise his powers independently of the Board?

THE WITNESS: On all matters of appeal.

THE COURT: For example, what I am getting at is a problem comes to the Board, a teacher, for example, is fired by a School Board or something.

THE WITNESS: Yes.

THE COURT: He takes that up on his appeal and he rules on it?

THE WITNESS: That's right, and we can't overrule him.

THE COURT: I see.

THE WITNESS: On the District 18 thing, for example.

THE COURT: Let's say in strictly an educational situation where a particular school board does not come up to the mark as far as providing certain programs, then the Commissioner would have a hearing and he would rule on that?

THE WITNESS: Right.

THE COURT: And that would be up to him to make a judgment?

THE WI[illegible]: Absolutely.

THE COURT: Whether they have or they haven't?

THE WITNESS: Absolutely, and whichever side won or lost could not say "Now we are going to the Board of Regents and get the Commissioner reversed".

THE COURT: I see. Under certain circumstances

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standards and the Commissioner would be expected to follow your policy directives?

THE WITNESS: Right, and in those areas I do not think he has autonomy.

MR. PANFIL: Very well.

THE WITNESS: He would have autonomy only as --

THE COURT: I suppose he has discretion within the guidelines.

THE WITNESS: Right. He is subject.

THE COURT: He can only go so far one way or the other?

THE WITNESS: Right.

BY MR. PANFIL:

Q. At your meetings do you have somebody take minutes?

A. Not at the important ones.

Q. Well, is there an official report of the minutes or proceedings of the Board of Education similar to the Common Council of the City of Buffalo.

A. Perfunctory. Those minutes fulfill the requirements of the law only.

Q. Where would we find them?

A. In the secretary's office. They are printed. We get periodically the printed version of the official perfunctory minutes which would be a waste of time for you to read.

Q. Are these the education department reports or the State Department reports?

A. These are the official chartering actions. These are the things that we have to do by law and the minutes must show that we did them.

MR. PANFIL: Thank you, Doctor. I have no further questions, your Honor.

THE COURT: Mr. Gregory. Mr. Gregory, Dr. Clark, is the attorney for the City of Buffalo. Do you have any questions, Mr. Gregory?

MR. GREGORY: Are we going to continue?

THE COURT: Please.

MR. GREGORY: Are we going to continue right on through?

THE COURT: Do you want to take a short break?

MR. GREGORY: I would like to for a moment.

MR. SCHWARTZ: If I may, Dr. Clark has a

1:00 o'clock plane, if we could conclude the cross examination then we could break at that point because we didn't start that early because of Dr. Clark's plane.

THE COURT: Mr. Gregory, does it make any difference?

MR. GREGORY: I don't suppose so.

THE COURT: I think it might be just as well that we continue. Mr. Gregory is the attorney for the Buffalo School Board and the Common Council of the City of Buffalo.

CROSS EXAMINATION BY MR. GREGORY:

Q. Good morning, Dr. Clark.

A. Good morning.

Q. Dr. Clark, let me start off by asking you what is your, - in your capacity, what in your capacity as a Regent of the State of New York is your personal experience and knowledge of the Buffalo Public School System?

A. My personal experience and knowledge of the Buffalo

Public School System precedes my election to the Board of Regents ten, twelve years, maybe more. I really have lost track of the time, but I used to be invited to come up to Buffalo and to look at the schools and talk to School Board members.

MR. SCHWARTZ: I am not sure that that question "What is your knowledge" is a very specific question.

THE COURT: The Doctor was able to answer it so I will overrule the objection.

BY MR. GREGORY:

Q. In other words, what I am trying to get out and have in the record here is relative to your conversations with Mr. Schwartz earlier this morning how these conversations can be specifically pointed to the City of Buffalo's educational system.

A. Have I been concerned or involved or have had discussions about the Buffalo School System?

Q. Yes.

A. Yes, I have many, many times.

Q. Have you reviewed reports relative to the Buffalo School System with regard to the segregation or the racial imbalance or integration, however you want to use those words?

A. Not in recent years, and I mean not within the past five or six years, but earlier I used to have discussions with Superintendent Manch. In fact, we stopped having discussions now because we sort of reached a plateau.

Q. Were these discussions, if you can recall, in your official capacity as a Regent?

A. No. I don't think I have had any serious discussions with him since I have been a Regent.

Q. All right.

A. But we certainly used to have discussions prior to my being a Regent.

Q. Okay. Well, what I am concerned about is that earlier in your testimony you said in effect that you were constantly at loggerheads with Dr. Nyquist and your colleagues relative to the pace of integration in the Buffalo School System.

A. If that is the impression I gave about being constantly at loggerheads, and I suppose that is a good word, - I have been at loggerheads with the Commissioner overtly on these matters since September of 1973 when he gave the order in regard to District 18 and certainly the conflict, the difference of perspective, you know, the difficulty in communication or understanding have been clearer within the last year than before. Before it was beneath the surface.

Q. Well, I don't know. I guess you have lost me then.

A. You said I was constantly at loggerheads.

Q. Then what are you saying, you weren't constantly at loggerheads with them?

A. Well, that term is more than likely to be closer to the truth within the last year than prior to September of '73.

Q. All right. Well, how, - in other words, what I am getting down to is what do you, - what is it that you base the fact that the Buffalo Public School System is unconstitutionally segregated?

A. Very simple, Mr. Attorney, that Commissioner Allen many, many years ago handed down a directive. First it was a holding that the schools were segregated. Then a directive saying come up with a plan to desegregate these schools and implement this plan. Commissioner Allen's finding and directive were ignored. Commissioner Nyquist comes in and earlier than I had remembered, by the way, and he finds the same thing.

He says come up with a plan. Now, I recall very clearly a meeting in which he described the steps that he had taken. I didn't recall before your questioning. Nyquist describes a number of things which he did beyond Allen and in effect said the Board is not doing anything, the Board in Buffalo is telling us to go to hell, you know, and it is at that point that I say "Look, a public body cannot afford to sit back and be quiet." I would say this, your Honor, without regard to the racial issues, that if we are saying to the public that we have a responsibility for governance, we cannot sit back and watch a Board of Education defy. We have a similar problem with regard to Vassar College and I am taking precisely the same position there, that we either serious in fulfilling our responsibility in governing education and therefore letting the Board of Education in Buffalo or New York City or any other community know that once the orderly procedures are gone through, once the Board of Regents and the Commissioner have followed the law and arrive at a certain decision it is tantamount, if not indistinguishable from anarchy to have a Board say, you know, expletive, expletive, and get away with it, and this is what the Board of Education of Buffalo has consistently done, and if this is right, then we should get rid of the Board of Regents, you know, you should get rid of the Commissioner and stop fooling people. I am sorry.

Q. That is quite all right, but in essence the answer to my question then is that you are basing your determination that the Buffalo schools are in fact unconstitutionally segregated on what Dr. Allen determined?

A. And Nyquist.

Q. Excuse me, please, and what Dr. Nyquist determined.

A. That is their role. That is their function.

Q. All right, fine, but the answer to my question is "Yes"?

A. Yes.

Q. Do you have any other independent sources other than these two things that you have discussed with us that lead you to conclude that the Buffalo Public School System is in fact unconstitutionally segregated?

A. Yes.

Q. All right. Would you kindly tell us what those --

A. Yes.

Q. --independent factors are?

A. Everybody knows it.

Q. Well, I will take issue with your answer because I for one don't know it.

A. The Board knows it. I can't engage in double talk on these matters. The Board knows it and the Board is acting to perpetuate it.

THE COURT: Mr. Gregory, are you asking Dr. Clark whether he has looked at recent figures, number of pupils, number of schools, where the students are in classes and so forth?

MR. GREGORY: Any other independent factors other than what he has just told us about.

THE COURT: All right.

MR. SCHWARTZ: For whatever it is worth, your Honor, we did not go into the question of Dr. Clark's judgment of whether the Buffalo Public School System was segregated. We focused essentially on the Board of Regents policies and Dr. Nyquist.

MR. GREGORY: He has been qualified as an expert in this area and he is in here testifying that --

THE COURT: Of course, the ultimate, - each witness can be called for a particular purpose. You can call a man from let us say Oregon to come in and he may not be at all familiar with the particular facts before us. The ultimate question is for the Court to decide anyway.

MR. GREGORY: What is that? I don't follow you.

THE COURT: Whether the schools are or not segregated, right?

MR. GREGORY: The ultimate determination is for the Court to make.

THE COURT: Yes.

MR. GREGORY: Of course.

THE COURT: Fine.

MR. GREGORY: Okay.

THE COURT: I think the answer is, Doctor, you have not examined recent figures as far as pupils, where they are in

Buffalo?

THE WITNESS: No, your Honor, I have not examined recent figures on those matters except those found in the Regents reports or reports presented to the Regents by the Commissioner and its staff, but your Honor, if you will permit me, I will say that I just can't take seriously anyone asking the question are the schools in Buffalo segregated when that is what your School Board is defending and you know that.

BY MR. GREGORY:

Q. All right. There isn't any point in pursuing that further.

A. People have been elected to your Board to defend continued segregation.

Q. Now, you said in 1940 you and your wife conducted a study on the effects of discrimination on black children, is that correct?

A. Yes. That was not the title of our report, of our study. The technical title, Racial Identification and

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think Doctor has already explained to us that he alone, - there are many, many other workers in the field here and many other studies in the field.

MR. GREGORY: Yes.

THE COURT: So your point is you say that he, - I mean there are a lot of other individuals who have come to conclusions similar to Dr. Clark, right?

BY MR. GREGORY:

Q. I don't know. It may be, but I know that Dr. Clark, in his letter to Dr. Nyquist which has been introduced into evidence, said, and I am not quoting, obviously, because I didn't take it down, the effect of racial isolation on blacks, low achievement, low self-esteem increases his awareness of rejection. You said that earlier, didn't you?

A. Yes.

Q. In your testimony?

A. I say that so many times I get tired of hearing myself say it.

Q. All right, fine. Now, where I am getting is that this is basically what you said in your testimony in the Brown case, is it not?

A. Without question.

Q. All right, but the particular system that was involved in the Brown case is quite different from the system that exists here today in New York State and more specifically in the City of Buffalo, the system we are dealing with in this particular case, isn't that true?

A. I don't think so, absolutely not. It is the same effect. I mean, you segregate children and say you are not segregating them to me, and I haven't done any studies on it, but if you really want to know what I think, Mr. Gregory, I think you give people a greater sense of moral help if you are not hypocritical about what you are doing, you know. You will provide your child with a greater chance of some kind of moral strength if you don't say "Look, you know, we are not segregating those people, we are not being cruel to those people, we are not rejecting them like the Southerners did, but it just so happens that they are in a segregated school, it just so happens that they can read, it just so happens that we don't give them the same attention". In many ways I think the Southern states were more honest when they came right out in the law, and if you look at what has happened by way of desegregation since 1969 the evidence is absolutely clear that the Southern desegregation process is proceeding much more rapidly and much more honestly.

THE COURT: Mr. Gregory, why don't you go on to a different area? I think that is a difference without a distinction or a distinction without a difference.

MR. GREGORY: All right. Your Honor, though, has not this witness been qualified as an expert in this particular field? He is a member of the Board of Regents.

THE COURT: Number one, Mr. Gregory, we are not going to reargue the Brown case here.

MR. GREGORY: I have no intention of rearguing the Brown case.

THE COURT: Number two, we have Dr. Clark's testimony here which he has given and which you have cross examined him on. Are you going to bring in other testimony here contrary to what he said?

MR. GREGORY: I don't follow you with other testimony contrary to what he said.

THE COURT: One minute you tell me you are not going to reargue the Brown case and then you keep asking Dr. Clark questions about his conclusions which he has referred to a number of other studies which, - where they agree with his conclusions in this area. If you are going to bring in evidence to the contrary, that means that what you want to do is reargue Brown.

MR. GREGORY: I think Brown is perfectly good law.

THE COURT: All right, very well. Let us go on to something else.

MR. GREGORY: You know, if I may say this for

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the moment, your Honor, it seems to me that it becomes rather difficult to discuss with this witness, or for that matter, any witness in this particular case, the testimony and the facts involved in this case, when this particular individual, and I have no argument with you, Dr. Clark, about this. This is something that is just in general. When this particular witness says that he finds the Buffalo School System is segregated and therefore he is constantly on Dr. Nyquist's back to do this, this and that, this and that to integrate the schools, I submit to the Court that this particular type testimony really has no impact or should have no impact.

THE COURT: Mr. Gregory, this is argument you can make to me later on.

MR. GREGORY: No. Your Honor, the reason I want to make it to you now --

THE COURT: We have the record here now of what the Doctor has done. He has reviewed the Regents. He hasn't looked particular records, if that is the point you are going to make.

MR. GREGORY: That isn't the point I am going to make, your Honor. This gentleman, if I understand his testimony, has in effect as a member of the Board of Regents indicted the Buffalo Public School System and determined and declared --

THE COURT: It is the Board of Regents, the Commissioner, the history in the case, they have all indicted the Board of Education.

MR. GREGORY: If that is the case, what are we doing here, what are we doing here, with all respect to the Court?

THE COURT: For heaven's sakes, Mr. Gregory, this case is not going to be decided only on the testimony of Dr. Clark.

MR. GRSGORY: I know, but it is not going to be decided on the testimony of any particular witness if I am going to be precluded from cross examining.

THE COURT: We have the records of all of the correspondence which went back and forth between the Regents, the Commissioner, the Board of Education, the press conferences by the Board, all the rest of it. That is what it is going to be decided upon, not whether Dr. Clark in recent months has reviewed in particular the records of the Board. If you want to argue to me later that I should discount his testimony because he hasn't, I will listen to that argument.

MR. GREGORY: I don't want this Court to discount this gentleman's testimony.

THE COURT: You go ahead and ask questions.

MR. GREGORY: All right, I will ask him a question.

THE COURT: Ask questions, please.

BY MR. GREGORY:

Q. Dr. Clark, what in your opinion constitutes a segregated school system?

A. A school system in which the fact is that the schools in that system have racially homogeneous student population under conditions where this is remediable.

Q. Does that mean that one school in the system that exists that way makes it a segregated school sytem?

A. I said "Schools" in my original answer to your question but now that you ask the question, I would say that if a single school had a racially homogeneous school population that was not in any way, you know, explainable or God ordained or a direct result of factors over which school administrators or governance people had no control. For example, if there were a school for paraplegics, you know, and for some particular reason there were no white paraplegics by the very rule of reason it would seem to me that no one would say that a school for paraplegics which had a sound justifiable educational purpose that was racially homogeneous was by that fact segregated. You know, it would seem to me that that would be violating the sense of reason. If, on the other hand, a school district or a school board decides that it is going to set up a school for exceptionally talented children and it turns out that in that particular school district the decision as to what is an exceptionally talented child just happens to coincide with children who are vermillion and all the vermillion children are considered exceptionally talented, I would argue on the basis of my years of involvement that that is a racially segregated school and violative of the Constitution because it was remediable; it has no fundamental educational purpose or function.

Q. Okay. Assuming arguendo --

A. And that's why I said, you know, it could be in one, although when you find school districts with segregated schools, you don't find them with one. You find them with a system, a pattern, and you also find them defending it.

Q. Now, you said that Commissioner Nyquist serves at the pleasure of the Regents, right, and that a vote can be had?

A. At any time.

Q. At any time to deem his office vacant?

A. According to the law, that's right.

Q. Now, how would this vote come about?

A. Someone could ask the Chancellor to have a, - call a meeting or at a regular meeting. I told the other gentleman that we really don't have strict written rules.

THE COURT: In other words, I suppose to put it in meeting language, a motion could be made?

THE WITNESS: Of course a motion could be made either at a regular meeting or if someone or more members of the Board felt strongly enough that we should call a meeting in between and could get enough Regents to attend.

BY MR. GREGORY:

Q. This has not been done, has it?

A. What?

Q. This has not been done with respect to Dr. Nyquist?

A. Of course not.

Q. You haven't made any attempts to do this either?

A. Of course not.

MR. GREGORY: I have no further questions.

MR. SCHWARTZ: No questions.

THE COURT: There is a call for you, Dr.

Clark. You can use the phone in my chambers.

THE WITNESS: Thank you very much, your Honor.

THE COURT: All right. We will now be in recess. Dr. Clark is concluded as a witness?

MR. SCHWARTZ: Yes, he is.

THE COURT: All right. Thank you, Dr. Clark. Why don't you step right over here, please.

(Recess taken at 12:15 p.m.)

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PROCEEDINGS: October 17, 1974, 2:12 P.M.

APPEARANCES: As before noted.

MR. SCHWARTZ: Your Honor, I should like to introduce to the Court Mrs. Marilyn Hochfield who has been working on the case and will sit at counsel table with us.

THE COURT: Mr. Schwartz, do you have any further evidence?

MR. SCHWARTZ: The Plaintiffs rest at this time.

THE COURT: The Plaintiffs rest. I will consider motions later on. As I understand it, you may make your motions at a later date. Mr. Gregory, do you have some witnesses now?

MR. GREGORY: Yes.

LEONARD TESTA (99 Paddock Street, Williamsville, New York), a witness called by and in behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

* * *

THE COURT: All right, and after that date, It became part, permanently, of the Lafayette District?

THE WITNESS: That is correct, and this area became permanently a part of the Riverside area. This area, in 1957 was optional between Grover, Lafayette and East and Bennett. In 1957, it was eliminated as an optional area and assigned to Grover Cleveland High School.

THE COURT: What about the green area to the north of that?

THE WITNESS: Would you like me to finish the reds before I do the greens?

THE COURT: Why not finish that.

THE WITNESS: This area, and I can go back - -

THE COURT: Now referring to the - -

THE WITNESS: Referring to the south.

THE COURT: The furthest east on the map?

THE WITNESS: I am referring to what is now the southern section of the Kensington

High School District from, let's say, Broadway south to William Street, bordered on the west by, - I think it is the Erie Railroad line, and on the east by the city line itself. My research indicates this, from 1937 to 1940, this area was part of the Kensington High School District. On April 24, 1950, this entire area was part of the East High School District. The lines for East High School came out this way and encompassed this area. On July 25, 1951, the Board made this area optional between Kensington High School on the north and East High School on the west. As I recall, the reason for that was many of the parents in this area indicated they could walk to Kensington, but they had to take a bus or car, what have you, to East.

MR. SCHWARTZ: Your Honor, objection. Could we limit ourselves at this point to

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A. All right.

MR. SCHWARTZ: No further questions.

THE COURT: Mr. Panfil?

MR. PANFIL: I have no further questions.

THE COURT: Mr. Gregory, anything further?

MR. GREGORY: No, sir.

THE COURT: Thank you, Mr. Testa. Do you want to offer that exhibit, Mr. Schwartz?

MR. SCHWARTZ: Oh, no, it doesn't do anything to the case as far as I can tell.

THE COURT: Very well. Do you have another witness, please, Mr. Gregory?

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EUGENE REVILLE (84 Sunset, Town of Tonawanda, New York), a witness called by and in behalf of the Defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. GREGORY:

Q Mr. Reville, what is your present position?

A I am the Associate Superintendent for Instructional Services for the Buffalo Public Schools.

Q How long have you served in that capacity?

A Three years.

Q And before that you were employed by the Board of Education?

A Yes. I was an Assistant Superintendent for the Federal programs, a principal and an assistant principal and teacher.

Q Where were you a principal, in what school?

A School 53. It is on Roehrer Avenue between East Utica and East Ferry.

Q Would that be considered a predominantly black school?

A At the time, it was about 99 per cent black, yes.

Q At the time you served there?

A Yes.

Q All right, and where did you serve as an assistant principal?

A At the same school.

Q And at the same time that you were an assistant

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a rise in percentage of black students attending vocational and technical high schools and I think this is one of the affirmative policies the Board has taken.

Q In checking out these charges, did you find them to be true?

A Well, in the case of, - it is difficult to determine whether it is true or not. In the case of Hutch Tech, we went into it very carefully and I determined and the information I received in checking that students at Hutchinson Central Technical High School were being accepted primarily on the basis of the test. Some students were being accepted and it was my opinion at the time, and the opinion of the Committee this was discriminating against minority group students.

Q The manner in which the test was being administered?

A No. What I was saying is the test itself and the fact that it was weighted so heavily, resulted in preventing some minority group students from attending Hutch Tech, so one of the things we did is we eliminated tests from all vocational schools and we first had asked that the test be eliminated from

Hutch Tech and what occurred was that we changed the test because we investigated what the test comprised and our action at the Board of Education felt this test didn't measure what was taught at Hutch Tech so the test was changed and the wording of the test was lowered considerably at Hutch Tech.

Q And as a result of these changes, what conclusions did you draw with respect to the fostering of integration in the vocational schools?

A I think it has worked toward the fostering of integration in the vocational schools, in all the vocational schools, Hutch Tech and McKinley we had a rise in percentage and I think it was an affirmative action on the part of the Board in doing it.

Q Now, there is also a charge in this lawsuit with respect to the racial imbalance in the staff?

A Yes.

Q Of the school system. Now, for purposes of this lawsuit, anyways, staff has been considered administrators as well as teachers?

A That's correct.

Q Okay. Now, did you also have a complaint other than what is in the lawsuit here from HEW in this respect?

A Yes.

Q All right. I am sorry. Go ahead.

A HEW, we were attempting to become eligible for integration funds, a million and a half, and HEW, the organization which governed these funds listed what they considered violations. Evidently, they had this information from a study. I don't know that, I don't know that they did, but I am fairly certain that they had this information from the study.

Q Wait. Let me just stop you right at that point. The study made by Mr. Francis' HEW Group, was that ever made available to the Board?

A No, it wasn't.

Q Go ahead.

A And information they gave us is that there were three elementary schools, Schools 37, the BUILD Academy and 47 which had racially imbalanced staffs. BUILD Academy had 75 per cent black. School 37, - I will read it off so I won't do it just from memory. Well, School 37, if I am not mistaken, was 43 per cent and School 47 was something like 62 per cent.

I am reasonably correct on those and then we had nine elementary schools in predominantly white areas which had no white teachers and they said that because of this that they didn't believe we were eligible for these funds and so we wrote a letter back and said we would take affirmative action policy at least on these schools and in other areas, pointing out first that we would poll the black members of the staff at the three schools and ask how many would like to be transferred and we would attempt to transfer them to schools in predominantly white areas where there were no or few black members.

Q Was this done?

A Yes, it was done. We lowered the per cent of black teachers at BUILD from seventy-five down to fifty-two per cent. At 37 it was something like, - at 47 it was something like sixty-two per cent down to thirty per cent and at the, - 37 it was from forty-three per cent down to twenty-nine per cent. Of the nine schools, we were able to get black teachers into three of the nine and I think very soon we will get a fourth one into the nine schools and this certainly isn't integrating the staffs, but we are moving in that direction,

Q All right. Now, what would the results, - you said you told them that you were going to poll the staffs in those three schools that they complained of. What was basically, the result of that poll?

A The result of the poll is we had some black teachers who were willing to move but primarily in this school and other schools, black teachers would prefer, from my experience, to teach in predominantly black schools.

Q And how far back does that experience go?

A My own experience?

Q Yes, with the teachers, I mean.

A Back to 1960 when I was the principal of an all black school. Also you ask about administrators. Since I have been associate superintendent, forty percent of the appointments made for principals have been black. Seven of the nine principals I appointed, black principals, were put in predominantly black schools and it is my opinion that, - although I think the staff should be integrated and we have an affirmative policy of integrating staffs, given the racial composition of the schools as it is now, I believe that there ought to be black principals in predominantly black schools and there ought to be black teachers in predominantly black schools. This opinion is not only held by me, but most black teachers and most black principals, and I would say most of the black community because they exert a tremendous amount of pressure on me to assign these principals and teachers to predominantly black schools.

Q This is in spite of the policy of the Board to integrate?

A That's correct, and I feel we have made some headway in the policy, but if I were asked what I felt, do I believe a black principal should be in a predominantly black school, I would have to say again, given the racial composition of our schools now, I think black students need black principals and black teachers for role models and these black teachers and black principals are very important in the community because of their knowledge of the community and their rapport with the students and again my experience with black parents, black community groups, black principals and teachers and black Board members, the way, I think they are almost unanimous in agreeing with me on that particular point, so we are doing something we don't completely agree with.

Q Now, breaking down staff into teachers and administrators, how many teachers do we employ in our system?

A Oh, I would guess about thirty-four or thirty-five hundred.

Q All right, and how many of those are black?

A My understanding, 11.4 per cent are black.

Q Can you translate that percentage into numbers?

A It would be about three hundred fifty, three hundred, seventy, I would guess, using my mathematics.

Q All right, and what efforts have you made to disperse these black teachers throughout the school system?

A Well, the efforts I have described also I have attempted to do this by the assistant superintendents and the directors in charge of these areas have been instructed that new black teachers and black teachers who ask for transfers, black teachers who are returning from leave are to be placed in predominantly white schools or schools that have predominantly white staffs and this particular policy has been under attack. Also, this is difficult also because

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what I am, - I think we should compare apples with apples and oranges with oranges, and we are talking about administrators which is a promotional position and all the evidence I have indicates that the number, the per cent of administrators in the last three years, as a matter of fact, in the last seven years, has risen dramatically. You can't properly include psychologists, school social workers and attendance teachers, and I think that the plaintiffs here made the mistake of doing that when they made their complaint.

BY MR. SCHWARTZ:

Q I am glad to know that you are directing your testimony to the complaint as opposed to something else, but I won't comment on it, but I will simply read for the Court the totals for '72-'73; '73-'74 and '74-'75. This is something that you prepared as administrator, correct?

A. No. This was prepared in Mr. Clapp's office. He is the, - by Mr. Al Thompson who is his assistant, and from the figures that he has.

Q. Okay. Now, the dramatic increase is as follows, '72-'73 we have fourteen, accounting for 14.1 per cent and '73-'74 we have fifteen, accounting for 14.6 per cent and in '74-'75, we have seventeen, accounting for 16.5 per cent. That is the dramatic increase.

A. It absolutely is when you consider that there is a loss of ten administrators in the central office in the last year. In other words, you have to figure in the fact that we are losing administrators.

THE COURT: Mr. Schwartz, we have the figures.

MR. SCHWARTZ: I am through, your Honor.

THE COURT: You can argue later.

MR. SCHWARTZ: I am not arguing, I am through. I have rested. I am not offering this in evidence. It is not my document.

THE COURT: Do you have some other questions?

MR. SCHWARTZ: No.

THE COURT: Mr. Panfil.

* * *

will hear from Mr. McGovern now, and if there is any reason why we need time for cross examination, we would perhaps have to have another meeting.

MR. PANFIL: Your Honor, I would like to explain. I did not know until yesterday afternoon that he could come. I thought we were going into session this morning, and I came over at 10:00 o'clock to inform everyone, and I found out we were meeting at 2:00. That is the reason.

THE COURT: All right.

MR. PANFIL: Chancellor McGovern.

JOSEPH W. McGOVERN, called as a witness on behalf of the Defendants, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PANFIL:

Q. Chancellor McGovern, would you tell us what your present position is with the State of New York?

A. I am a member of the Board of Regents of the University of the State of New York, and have been chosen by my colleagues as Chancellor of the Board, which means that I am the presiding officer.

Q. I see. How long, sir, have you served in the capacity of Chancellor?

A. I have been Chancellor since 1968, since April 1, 1968. I have been a member of the Board since April 1, 1961.

Q. I see. And I take it that this is not a full-time job with you?

A. No, this is a part-time job, voluntary work, uncompensated, and I am a practicing lawyer. That is the way I earn my living.

Q. I see. Could you, sir, give us a brief outline of the position of the Board of Regents within the government of the State of New York?

A. I will begin with the Constitution of the State. The Constitution names the Board of Regents as the head of the State Education Department, and it is provided that the Board shall have such powers and duties as the legislature may assign to it from time to time. The Board of Regents also has under the Constitution the power to appoint the Commissioner of Education, who serves at the pleasure of the Board, and he is the Chief Executive Officer for the Board and is the head of the department, that is, the acting head. When I say "head of the department" I mean the full-time person in charge of departmental operations.

Q. And, sir, what are the powers and duties of the Chancellor?

A. Well, the Chancellor is the presiding officer. I am the spokesman for the Board in many areas. I determine agenda in consultation with the Commissioner, and have many ceremonial as well as other duties.

Q. I see. And can you give us a comment briefly on those powers and duties the legislature may have decided to delegate to you?

A. That would be a long litany, but the jurisdiction of the Board of Regents and the Education Department is unique in New York in that it covers all of education from pre-elementary schools, beginning with the nursery schools, and through graduate education, colleges and universities, and it has a jurisdiction over both public and private education. It is in one aspect a policy-making body, a group of laymen from different backgrounds, different parts of the State, and come together with the assistance of their professional employees, to determine policy. In addition to that, the Board of Regents has been assigned by the State Legislature many functions in the field of education. Just to give you a couple of examples, every four years the Board is charged with the duty of preparing a master plan for higher education, and a supplementary progress report every two years. The Board has jurisdiction over the professions, in licensing all the professions except the law, and disciplining them when occasion arises. The Board also has jurisdiction over the whole gambit of elementary and secondary education, in the sense that it is the head of the department which supervises curricula, which does testing, and presents other information to the Board which relates to the progress of education throughout the State.

Q. I see. Would you tell us about the membership of the Board, how does one become appointed and what is his term?

A. A member of the Board of Regents is appointed by the State Legislature by joint resolution or concurrent resolution. It is the only office in the State appointed that way. The Governor does not act in case of a Regent appointment. The law provides that there shall be one Regent from each judicial district in the State, and there are eleven judicial districts, and there are four Regents at large, so the Board is composed of fifteen members selected in that way.

Q. I see. What about the term of office, sir?

A. The term of office, up until last year there was no specified number of years in the law for a Regent's term. The law simply said Regents shall be appointed to such terms so there be one expiration each year. Back some years ago when there were nine members of the Board, the term was nine years. When the numbers grew to thirteen, fourteen and fifteen, the term grew with it, so that in recent years it has been fifteen years. The legislature last year, at the request of the Regents, made certain changes and reduced the term to seven years. The Regents had requested a reduction to ten years.

Q. Could you tell us something about the operation and procedures of the Board of Regents with regard to meetings, rules, et cetera?

A. We hold monthly meetings, which begin usually at midday on a Wednesday and carry through to midday on Friday, and include an evening session on Wednesday and Thursday evenings. The dates for those meetings are selected or agreed upon by the Board in advance, many months in advance. When the time for the meeting is approaching, an agenda is prepared and sent to all the Regents well in advance of the meeting date. The Regents employ a committee system so that many items of business that can be handled expeditiously by less than the whole number of the Board are handled in committees. We have a committee on elementary and secondary and continuing education, and one on higher and professional education, and one on cultural education, one on administration and law. Matters that can be handled, in the judgement of the Commissioner and myself, by the whole Board, are considered and discussed in committee of the whole session, with all members of the Board present. Work in this regard is usually completed by Thursday evening or early on Friday morning, and on Friday morning we generally have a public meeting at which public action is taken, votes are taken in formal session, and that is the session at which the actual legal decisions and measures are adopted, and that is followed generally by a press conference at which the Commissioner and I and other members of the Board are open to questions by the press.

Q. I see.

THE COURT: Mr. McGovern, did you say your meetings were monthly or weekly?

THE WITNESS: Monthly, generally monthly. We have eleven monthly meetings in a year, we telescope July and August and have one meeting for July and August in the summertime. We also have special meetings when the occasion arises.

BY MR. PAMFIL:

Q. Is a journal kept of the record?

A. There is a journal kept of the official actions taken by the Board.

Q. Now, is there an annual reorganization meeting?

A. The Regents year begins on April 1st, because Regents' terms expire on March 31st, so we may have new members of the Board, so at that time the Chancellor reviews the committee membership and makes changes or reappointments or new appointments. At that time also the program is laid down as far as six or eight or nine months in advance. Also I might say that each of the committees adopt a list of topics that they want discussed in committee meetings for the foreseeable future, so that the department in preparing the paperwork and the information that is desired by the Board may be well instructed to proceed.

Q. The term of office of the Chancellor, is that three years?

A. In 1967 the Board of Regents adopted a rule -- we have Regents rules which have the force of law, which are authorized by law -- adopted a Regents rule which specified that the term of the Chancellor and the Vice-Chancellor, there is also a Vice-Chancellor, shall be three years. I was the first Chancellor to be elected to that stated term, becuase prior to 1967 there was no stated term for Chancellor, he continued until he chose -- he either reached retirement age or chose to leave the Board. Since then we have had a three-year term.

Q. Does the Board of Regents have an executive arm which can execute its promulgations and directives?

A. I think I have to distinguish between the types of directives we make. In the area where certain duties are given to us by statute and we direct that certain things be done, then, of course, the Commissioner and his subordinates in the department have the duty to carry out our determinations. In the case of policy statements, they are of such a character that I think we rely on the force of persuasion of their inherent merit to bring results, rather than to have a specific enforcement procedure.

Q. Could you tell us, sir, about the policy of the Board of Regents in regard to segregation in the primary schools and high schools?

A. We like to use the word integration, but I suppose one is the correlative of the other. Beginning back in 1960 the Regents -- that was before my time because I went on the Board in 1961 -- but the records of the Regents show that beginning in 1960 the Regents considered the educational aspects of integrated education, and since that time issued a series of statements; one in 1960, one in 1968, another in 1969, and the most recent one in 1972, which expresses our views on this subject.

THE COURT: Excuse me. You became Chancellor in 1967?

THE WITNESS: 1968.

THE COURT: Then you served until 1971?

THE WITNESS: I was re-elected Chancellor by the Board.

THE COURT: Then you were re-elected?

THE WITNESS: Right. I was re-elected again in 1974.

THE COURT: All right.

THE WITNESS: I am in my third term as Chancellor.

BY MR. PAMFIL:

Q. The policy statement, sir, in 1972, is that comprehensive, containing the integration policy of the Board of Regents?

A. I think it follows on the other prior statements, but I think it is the most up to date expression of view that the Board has made, and it specifically addressed itself to transportation of pupils to achieve integration, which was not so specifically addressed in the prior statements.

Q. I see. Do you have a copy of that with you that we may have?

A. Yes, I do. This is it.

MR. PANFIL: Would you mark that, please?

(Document referred to was marked Defendants' Exhibit 20 for identification.)

BY MR. PANFIL:

Q. Chancellor McGovern, I show you Defendants' Exhibit 20, would you describe it for me, please?

A. This was a statement adopted by the Board of Regents in 1972. I'm sorry I don't have the exact date, but I believe it was in the spring of 1972, and I point out that this exhibit 20 contains the statements of three Regents whose views were contrary to the views of the majority of the Board.

Q. I see.

A. The main statement itself represents the view that the majority of the Board, all the other Regents, concurred in.

Q. Is that then the current and applicable policy of the Board of Regents of New York State?

A. That is the most recent expression of Regents policy in this area.

Q. Is there anything significant in that document that you would like to point out to us?

A. Well, I think it is significant that the statement addressed itself to both constitutional doctrine and educational philosophy, and referred to the Brown decision, and the obligation of public bodies and public officials, regardless of their personal views, to obey the mandate or the principals as established by the United States Supreme Court. It also stated the educational considerations which, in the opinion of the majority of the Board, justified the transportation of pupils to achieve integration. It also noted that the health and safety of children and the educational experience that they would receive at the school to which they were transported were very important considerations and, in fact, could be overriding considerations.

Q. Is it customary practice, Mr. Chancellor, for the

Board to occasionally from time to time review their policies?

A. Yes, as circumstances require. You know, we don't have a set policy to review every position paper that we have issued, we have issued quite a series of position papers covering many other areas than that of integrated education. We don't have any set formula or schedule for reviewing, but as circumstances require, and as individual Regents may request, we do review, and right now we do have a review pending of our statement on integration, our position.

Q. Tell me this, did the Board of Regents, as a Board, ever pass a resolution directing the Commissioner of Education to cease acting under this directive or policy statement?

A. No, we did not.

Q. Is this policy statement presently under review?

A. This policy statement is under review. May I explain?

Q. Please.

A. It would be desirable if I explained just what happened. Earlier this year, in April and May, some of the Regents thought it was time for us to review our position on integration. It was my view, as presiding officer, that we should defer such consideration until the Supreme Court decision in the Detroit case. When, however, it seemed that that decision might be delayed, I set apart on our agenda, set aside a full day on June 26th, 1974, a full day for discussion of integration policy, and the Regents met in Albany. They came earlier than was their custom,and we spent all day in a frank discussion of that. The result of that was the adoption of a resolution, in committee as a whole, asking the Chancellor to appoint a committee to study the situation, make recommendations and report back. I appointed that committee shortly after the June meeting, and the committee has met and has reported, and its report will be considered at the Regents meeting to be held this week. I should explain also perhaps that the committee has no power to bind the Board, that its report merely contains recommendation and will have no force or effect until the Board considers it and takes action with respect to it.

Q. I see. What communication, if any, have you had with the Commissioner of Education in this regard?

A. In regard to the --

Q. In regard to the review or the --

A. The committee that I appointed, consisting of five members, in which I have acted as Chairman, has conducted its review of policy quite independent of the Commissioner. The Commissioner sought to make available -- offered, I should say, rather than sought -- offered to make available staff people to assist us, but as our deliberations went along, we felt we did not need that assistance.

Q. As it currently stands, this statement marked Defendants' Exhibit 20 is the official position of the Board of Regents?

A. That is right, as of the present date.

MR. PANFIL: I would like to offer that in evidence, your Honor.

THE COURT: Well --

MR. PANFIL: I have no further questions of the witness at this point, your Honor.

MR. GRIFFIN: May I have just a moment, your Honor.

THE COURT: Surely. Mr. Griffin, is it necessary to take some time to look for materials or anything?

MR. GRIFFIN: I don't think so.

CROSS EXAMINATION BY MR. GRIFFIN:

Q. Mr. McGovern, did you bring a copy of the report of the five-member committee that you say has met?

A. I don't have it with me, no.

MR. PANFIL: I'm going to object to this, your Honor. The report is to go before the Board of Regents, it is still unofficial.

THE COURT: He doesn't have it here anyway, so it is not necessary to rule on it right now.

MR. GRIFFIN: Well, I would ask that we be provided with a copy of that.

THE COURT: There is a lot of testimony here about the Regents policy, and certainly it is good to know the policy. It may be if the City didn't comply with the policy, that may be one thing. If the Regents have a policy, and we have heard a series of orders here, but if there was nothing further done about putting into effect their policy, that may be another thing. Now, if they have a change in policy at this time, I don't know whether -- that may have something to do with the Regents part of the case, but could it have anything arguably to do with the City's part of the case?

MR. GRIFFIN: The question that the Court --

THE COURT: In other words, keeping in mind that we have the Supreme Court decision which, as far as the law is concerned, will be our primary guide as to what to do, and then, as I understand it, Mr. McGovern, the committee is working on a suggested recommendation to the Board?

THE WITNESS: That is right.

THE COURT: And have they completed their report?

THE WITNESS: The committee has completed a report and submitted it.

THE COURT: All right. They have submitted it to the Board, but the Board has not -- I suppose the Board members are looking it over at the present time?

THE WITNESS: That is correct, your Honor.

THE COURT: Then you will meet on Friday and that is on the agenda, and that will be taken up?

THE WITNESS: It will be on the agenda for Thursday of this week.

THE COURT: Whether or not the Regents will at that time adopt, reject, modify, send back for further consideration or take some other action, you don't know now?

THE WITNESS: I could not say.

THE COURT: All right.

THE WITNESS: It would be pure speculation on my part.

THE COURT: In view of the state of affairs, at this time I will sustain your objection to the perusal of this report at this time.

MR. GRIFFIN: Does the Court also direct me not to inquire as to what the committee recommended?

THE COURT: I suppose you are aware of what the committee recommended?

THE WITNESS: I am, but I don't think that I should be required, if I may say so--

THE COURT: Mr. Griffin, I will sustain the objection.

MR. GRIFFIN: For the record, may I say that this witness was tendered by the defense, the matter of the report of the committee was raised on direct examination, and I would expect that the pregnant question after this witness leaves the stand is what does this committee recommend, and I just take that position for the record, in light of the --

THE COURT: The committee, I suppose, can recommend a lot of things, but unless the Regents take some action, all it is is a gleam in a father's eye or it is something that is churning around in the minds of the Regents, but it is not published as yet. I would think that perhaps considerations of public policy and a number of other reasons would indicate that it is best that we leave it right now and wait for action of the Board, and I will sustain any objection to questioning about the nature of the report at this time.

MR. PANFIL: Thank you, your Honor.

BY MR. GRIFFIN:

Q. In light of that, Mr. McGovern, I think I am going to have only a couple of questions for you. The statement of the Regents that you referred to, supporting integrated schools, has been in existence since early 1960, is that correct?

A. I referred specifically to a 1972 statement. That was the fourth in a series of statements that began with the 1960 statement.

Q. But in each of those statements the Board of Regents supported integration as a part of having quality education and equal opportunity in education for the citizens of New York State, correct?

A. Exactly.

Q. That has been reissued and reissued?

A. Right.

Q. Then I think you said in 1972, Exhibit 20, was the first time that the Regents statement focused specifically upon transportation as a means of achieving quality integrated education, is that correct?

A. Primarily focused, there may have been some reference in 1969 to assignment of pupils and redistricting, but I think your statement is generally correct, that the 1972 statement had a focus on transportation, and that the others did not.

Q. And this policy of the Board of Regents is long standing, since the early '60's, correct?

A. The policy of providing equal opportunity, educational opportunity for all children, and integrated education as a means to that end, that has been the policy of the Board.

Q. And I take it that you were not one of the persons who asked for the review of this policy earlier this year, is that correct?

A. That is correct.

Q. You are serving on the committee in a sense ex officio, in that you are the Chancellor?

A. I thought the matter was so important that I should assume the obligation of being chairman of the committee. I also appointed the Vice-Chancellor as a member of the committee.

Q. At the present time, starting in two days, this policy will be reviewed by the Board of Regents, correct?

A. Yes.

Q. Of course, what the Board of Regents may or may not determine to do, no one is in a position to judge as of this moment, is that correct?

A. That is correct.

Q. That depends on the composition of the Board and the minds of the members of the Board, correct?

A. That is correct.

Q. And, of course, the commissioner -- strike that. May

I have just one more minute, your Honor?

THE COURT: Yes.

MR. GRIFFIN: I have no further questions.

THE COURT: All right. Anything else, Mr. Gregory?

MR. GREGORY: No questions.

MR. PANFIL: Your Honor, I think it is important that Exhibit 20 be received in evidence, since it is the current statement relating to the policy of the Board of Regents.

THE COURT: You want to take a minute to read that?

MR. GRIFFIN: Yes. The only reason I paused was that the previous statements were kind of imprinted, nicely packaged form. Chancellor, this appears to be an excerpt out of the journal?

THE WITNESS: That is correct.

MR. GRIFFIN: Is it a complete excerpt for the 1972 restatement?

THE WITNESS: Yes, it is a complete statement.

MR. GRIFFIN: Your Honor, since it has been identified in that respect, I have no objection.

MR. PAMFIL: Thank you.

THE COURT: Mark it in evidence, please.

(Defendants' Exhibit 20, previously marked for identification, was received and marked in evidence.)

MR. PAMFIL: I have no further questions of this witness.

THE COURT: I believe that is all, Chancellor McGovern. Very nice having you here with us.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

THE COURT: Well, I suppose we can proceed with another witness. Do we have another witness here?

MR. GREGORY: Yes.

* * *

(Thereupon the court was in recess at 3:00 p.m.)

* * * * * * *

PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 3:10 p.m.

JAMES M. CONNORS, called as a witness on behalf of the Defendants, and being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GREGORY:

Q. Mr. Connors, you are presently employed by the Buffalo Board of Education, is that correct?

A. Yes, I am.

Q. In what capacity?

A. My title is Associate Superintendent for Personnel.

Q. And what do your duties entail?

A. It is my responsibility for the total personnel functions of the Board of Education, and that involves such things as recruitment, conduct of examinations, establishment of salary schedules, the application or salaries of various employees, both instructional and non-instructional, it includes contract negotiations, grievance processing, review of credentials, and recommendations to the Superintendent for appointments, transfers, promotions, et cetera.

Q. All right. Now, when you talk about personnel, could you be more specific, tell us what particular personnel you are referring to?

A. I am referring to all personnel in the Buffalo Public Schools. That would include in the instructional staff, all administrators, all teachers; non-instructional staff, all clerks, engineers, tradesmen, teacher aides, and the like.

Q. That is the entire ball of wax then?

A. The entire department, yes.

Q. Now, referring specifically to teachers and administrators in the system, and at this particular time referring specifically to teachers, could you give us briefly what is required of a person before they can teach in the Buffalo Public School System, as a

* * *

A. He said those people that you referred to in the deposition were sent the examination materials on recruitment dates and places, and so on, yes.

Q. Well, other than sending a notice out to the station or the newspaper that there would be an examination, was there anything over and above that that was done?

A. Such as what?

Q. My question is, you published a notice relative to upcoming examinations for teachers, correct?

A. Yes.

Q. That describes the time and place of the examination, among other things, right?

A. Yes.

Q. That notice doesn't say anything about "We are looking especially for minority teachers", or anything, does it?

MR. GREGORY: I don't know if Mr. Griffin is inferring by that that there is some law that says that it should.

THE COURT: Mr. Connors can answer that.

MR. GRIFFIN: I am trying to get the information.

THE WITNESS: No, the notice says that we were interested in teachers, period.

BY MR. GRIFFIN:

Q. That is sent out to hundreds of places, is it not, that notice of examination?

A. I don't know if it is sent out to hundreds. Well, if you count all our schools, yes.

Q. You say now that you checked with Mr. Henderson and he sent, to the best of your information from him -- I realize he isn't here to question -- but that a copy of that notice was sent to the Buffalo Challenger and to WUFO?

A. I don't know whether he specifically identified those two. I think that we have referred in our memorandum to newspapers and radio stations oriented toward the black community. If the Challenger is one of those, I presume they got copies.

Q. My question is, over and above sending out the formal notice of the examination, was anything else sent to these particular representatives of the media?

A. I can think of nothing else that would be pertinent.

Q. I didn't ask you that. My question was beside the notice?

A. No.

Q. Now, a recommendation that was made by Mr. Ravelle, Mr. Clapp and yourself in this Exhibit 300, was to have an intensive advertising and recruitment program established in selected areas where there is a concentration of black campuses to interest college seniors and graduate students to participate in the November 1973 and January 1974 Buffalo teachers examination, the services of NEA College Placement Office, branches of the National Urban League and other informed sources should be used to contact sources of potential candidates, right?

A. Yes.

Q. NEA wasn't contacted, was it?

A. No.

Q. Was the National Urban League contacted?

A. Not to my knowledge, no.

Q. I am not going over all of these statistics and other figures, Mr. Connors, because they are covered in the stipulation. But you have not had jurisdiction over the transfer of teachers, have you?

A. No, I do not.

Q. So that would have been -- the jurisdiction over any

* * *

Plaintiffs' Notice of Motion for Leave to Amend Complaint.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH

Plaintiffs

Civil Action
No. 1972-325

-vs-

EWALD P. NYQUIST, COMMISSIONER OF EDUCATION, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, JOSEPH MANCH, SUPERINTENDENT OF SCHOOLS OF THE CITY OF BUFFALO, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, STANLEY M. MAKOWSKI, MAYOR OF THE CITY OF BUFFALO, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO

Defendants

NOTICE OF
MOTION

PLEASE TAKE NOTICE, that on the 13th day of April, 1976 at 2:00 p.m. in the chambers of the Hon. John T. Curtin, the plaintiffs will bring on the within motion for a hearing and determination.

Dated: Buffalo, New York
March 29, 1976

Yours, etc.,

RICHARD F. GRIFFIN

Richard F Griffin

Attorney for Plaintiffs
Office and P.O. Address
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Buffalo, New York 14202
(716)849-4945

Plaintiffs' Notice of Motion for Leave to Amend Complaint.

TO:

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Manch, Hon. Stanley M. Makowski,
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Plaintiffs' Notice of Motion for Leave to Amend Complaint.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH

Plaintiffs

-vs-

EWALD P. NYQUIST, COMMISSIONER OF EDUCATION, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, JOSEPH MANCH, SUPERINTENDENT OF SCHOOLS OF THE CITY OF BUFFALO, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, STANLEY M. MAKOWSKI, MAYOR OF THE CITY OF BUFFALO, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO

Defendants

Civil Action
No. 1972-325

PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

The plaintiffs respectfully move the Court, pursuant to 28 U.S.C. Section 1653, and Rules 15 and 19 of the Federal Rules of Civil Procedure, to amend the complaint and summons herein in the following respects:

1. Adding as parties defendant the following persons: Eugene T. Reville, individually and as Superintendent of Schools of the City of Buffalo; Florence E. Baugh, Samuel E. Sacco, Joseph E. Murphy, Mozella Richardson, Dr. Matt A. Gajewski, Louis C. Benton, Michael J. Ryan, Joseph D. Hillery and Marilyn P. Kavanagh (individually and as member of the Board of Education of the City of Buffalo); Thomas M. Black, Carl H.

Pforzheimer, Jr., Alexander J. Allan, Jr., Joseph T. King, Joseph C. Indelicato, M.D., Francis W. McGinley, Kenneth B. Clark, Harold E. Newcomb, Willard A. Genrich, Emlyn I. Griffith, Genevieve S. Klein, William Jovanovich, Mary Alice Kendall, Jorge L. Batista, Louis E. Yavner, Martin C. Barell and Laura Bradley Chodos (individually and as member of the Board of Regents of the State of New York), upon the ground that it is desirable to have such persons parties defendant to accord the plaintiffs full and adequate relief in this action for declaratory judgment and injunctive relief.

2. To amend the title of the within action to read as follows:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM
and WILHELMINA P. SEALES, JOHN MEDIGE, and
THE CITIZENS COUNCIL FOR HUMAN RELATIONS,
INC. and NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, BUFFALO
BRANCH

Plaintiffs

-vs-

EWALD P. NYQUIST, INDIVIDUALLY AND AS
COMMISSIONER OF EDUCATION OF THE STATE
OF NEW YORK, THE BOARD OF REGENTS OF THE
STATE OF NEW YORK, THOMAS M. BLACK, CARL
H. PFORZHEIMER, JR., ALEXANDER J. ALLAN,
JR., JOSEPH T. KING, JOSEPH C. INDELICATO,
M.D., FRANCIS W. McGINLEY, KENNETH B. CLARK,
HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN
I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM
JOVANOVICH, MARY ALICE KENDALL, JORGE L.
BATISTA, LOUIS E. YAVNER, MARTIN C. BARELL
and LAURA BRADLEY CHODOS (INDIVIDUALLY AND AS
MEMBERS OF THE BOARD OF REGENTS OF THE STATE
OF NEW YORK), JOSEPH MANCH, INDIVIDUALLY AND
AS SUPERINTENDENT OF SCHOOLS OF THE CITY OF
BUFFALO, EUGENE T. REVILLE, INDIVIDUALLY AND
AS SUPERINTENDENT OF SCHOOLS OF THE CITY OF
BUFFALO, THE BOARD OF EDUCATION OF THE CITY
OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO,
JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT
A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN,

BEST COPY AVAILABLE

JOSEPH D. HILLERY and MARILYN P. KAVANAGH (INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF EDUCATION OF THE CITY OF BUFFALO), STANLEY M. MAKOWSKI, MAYOR OF THE CITY OF BUFFALO, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO

Defendants

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3. Amending Article IV of the complaint to allege the following:

DEFENDANTS

A. Defendant BOARD OF EDUCATION OF THE CITY OF BUFFALO, NEW YORK (hereinafter referred to as "the BOARD") establishes policies, practices, customs and usages which are applicable to the governance of the public school system of the City of Buffalo, New York.

B. Defendants Florence E. Baugh, Samuel E. Sacco, Joseph E. Murphy, Mozella Richardson, Dr. Matt A. Gajewski, Louis C. Benton, Michael J. Ryan, Joseph D. Hillery and Marilyn P. Kavanagh are the persons who hold the elective office of a member of the Board of Education of the City of Buffalo (hereinafter referred to as "the Board").

C. Defendant Joseph Manch has been appointed by the Board as Superintendent of the school system of the City of Buffalo, New York, and as such is the chief executive officer of the system. Defendant Eugene T. Reville is the successor to defendant Joseph Manch.

D. Defendant REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK (hereinafter referred to as "the REGENTS") establish the policies, practices, customs and usages which are generally applicable to public school systems in the State of New York. The REGENTS are charged by law with plenary power over the operation of the schools of the State of New York, including the selection of sites for school construction. The REGENTS are charged with an affirmative constitutional duty to exercise their powers so as to afford equal educational opportunities to all citizens, including the plaintiffs and the represented class.

E. Defendants Thomas M. Black, Carl H. Pforzheimer, Jr., Alexander J. Allan, Jr., Joseph T. King, Joseph C. Indelicato, M.D., Francis W. McGinley, Kenneth B. Clark, Harold E. Newcomb, Willard A. Genrich, Emlyn I. Griffith, Genevieve S. Klein,

William Jovanovich, Mary Alice Kendall, Jorge L. Batista, Louis E. Yavner, Martin C. Barell and Laura Bradley Chodos are the persons who constitute the REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK (hereinafter referred to as "the REGENTS").

F. Defendant EWALD P. NYQUIST is the chief executive officer of the State Education Department, appointed and serving at the pleasure of the REGENTS, and as such has general supervisory powers to implement the policies of the REGENTS and other laws of the State of New York applicable thereto.

4. To amend Article I of the complaint so that it reads as follows:

I

NATURE OF ACTION AND JURISDICTION

This is a civil action for declaratory judgment and injunctive relief under Title 42, United States Code, Sections 1981 et seq., including 1983 and other pertinent provisions thereof. Plaintiffs claim that defendants, while acting under color of state law, have deprived the plaintiffs and their class of rights guaranteed by the statutes of the United States and the Fourteenth Amendment of the United States Constitution by creating, maintaining, permitting, condoning and perpetuating racially segregated public schools in the City of Buffalo and the Buffalo Metropolitan area. Jurisdiction is based on 28 U.S.C., Sections 1343 and 2201.

In support of the motion the plaintiffs respectfully show to the Court that this Court has personal jurisdiction over each and every person named in the amended title of this action by reason of the appearances and participation herein. This Court also has full subject matter jurisdiction upon plaintiffs' requests for declaratory and injunctive relief by reason of the defendants originally named herein including defendants Ewald P. Nyquist and Joseph Manch. In the recent Second Circuit decision of Monell et al. v. Department of Social Services of the City of New York et al., ____ F.2d ____, (2d Cir. March 8, 1976), the opinion states at page 2420 of the printed advance copy of the decision:

> There is no doubt that municipal and state officials, sued in their official capacities, are 'persons' within the meaning of § 1983 when they are sued for injunctive or declaratory relief. See Wright v. Chief of Transit Police, slip op. 1561,

1562-63 (2 Cir. Jan. 15, 1976); Gresham v. Chambers, 501 F.2d 687, 690 (2 Cir. 1974); Erdmann v. Stevens, 458 F.2d 1205, 1207-08 (2 Cir.), cert. denied, 409 U.S. 889 (1972).

In Gresham v. Chambers, 501 F.2d 687 (2d Cir. 1974), the court held that the contention of lack of subject matter jurisdiction must be rejected because the complaint named Dr. Chambers and Mr. Patterson individually which for jurisdictional purposes was sufficient to preclude the action from being classified solely as one against the county (501 F.2d at 690).

However, to eliminate any possible issue of subject matter jurisdiction which may be raised by reason of City of Kenosha v. Bruno, 412 U.S. 507 (1973), and to afford full, adequate and effective declaratory and injunctive relief, the plaintiffs request the Court to follow the reasoning set forth in the decision of Ingram v. Wright, 498 F.2d 248 (5th Cir. 1974 at page 252), wherein the court upon remand stated in part:

> The district court should on remand grant the likely request of plaintiffs to add the individual members of the Dade County School Board as parties defendant under County Three of the complaint. Without regard to whether the plaintiffs may ultimately be entitled to any equitable relief against the School Board or its members, fairness and efficient judicial administration justify the addition of the individual school board members insofar as the plaintiffs seek declaratory and equitable relief restraining the School Board from authorizing or implementing corporal punishment in Dade County.... [Citations omitted]

WHEREFORE, plaintiffs respectfully pray that this Court grant the amendments herein to the complaint and summons in accordance with this motion and that the pleadings be deemed amended accordingly.

Dated: Buffalo, New York
March 29, 1976

Respectfully submitted,

RICHARD F. GRIFFIN

Richard F. Griffin

Attorney for Plaintiffs
2300 Two Main Place
Buffalo, New York 14202

Defendants' Nyquist and Board of Regents Affidavit in Opposition to Motion to Amend Complaint.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH,

Plaintiffs,

-against-

EWALD P. NYQUIST, COMMISSIONER OF EDUCATION, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, JOSEPH MANCH, SUPERINTENDENT OF SCHOOLS OF THE CITY OF BUFFALO, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, STANLEY M. MAKOWSKI, MAYOR OF THE CITY OF BUFFALO, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO,

Defendants.

AFFIDAVIT IN
OPPOSITION TO
MOTION TO
AMEND COMPLAINT

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

JEAN M. COON, being duly sworn, deposes and says:

1. She is the Assistant Solicitor General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, counsel for defendants Nyquist and Board of Regents and is fully familiar with the facts and circumstances of this action.

2. This affidavit is submitted in opposition to plaintiffs' motion to amend the complaint to add new parties defendant.

Defendants' Nyquist and Board of Regents Affidavit in Opposition to Motion to Amend Complaint.

3. Plaintiffs make their motion to add, as parties defendant, the new Superintendent of Schools of the City of Buffalo, the present members of the Buffalo Board of Education and the present members of the State Board of Regents.

4. The ostensible purpose of that motion is to cure any possible defect in subject matter jurisdiction of this Court under 42 U.S.C. § 1983.

5. The motion presented by plaintiffs is ineffective to cure such defect in jurisdiction.

6. The Supreme Court of the United States in Rizzo v. Goode, decided January 21, 1976, held that for jurisdiction under § 1983, it is necessary to have as parties defendant the actual persons or officials who acted to deprive plaintiffs of constitutional rights. The Court held there was no case or controversy present between the parties named and the plaintiffs. The Court also held that failure to act to restrain individual acts of discrimination or to eliminate future acts of discrimination is not "action" within meaning of section 1983.

7. While plaintiffs' motion to amend might have been prima facie valid prior to the trial of this action, it is not now after the close of proof.

8. None of the proof, particularly as to the proposed State officers to be added, demonstrates any acts on their part, either individually or in their official capacities, to deprive plaintiffs of any constitutional rights.

9. Some of these persons did not hold their present offices, either at the time the action was commenced or at the time of trial.

10. The motion also alleges that the individuals sought to be named as defendants are members of the Board of Regents. Two, Joseph T. King and Francis W. McGinley, are no longer members of the Board.

11. Subject matter jurisdiction based on such an amendment might be sufficient to try an action, subject to connecting the named defendants with specific acts in violation of section 1983. Even then, however, jurisdiction would fail, as it did in Rizzo, if on trial no acts of the named defendants were proven.

12. Here, where the trial is completed, the naming of these individuals is inadequate to confer subject matter jurisdiction where the trial record does not contain evidence connecting any of them with acts which deprived the plaintiffs of constitutionally guaranteed rights.

13. Mere naming of individuals against whom no cause of action is alleged or proven is not sufficient to confer subject matter jurisdiction under section 1983.

14. The relief sought by plaintiffs' motion will not cure

the jurisdictional defect inherent in their action.

WHEREFORE, deponent respectfully requests that the motion to add parties defendant be denied, with costs.

Jean M Coon
Jean M. Coon

Sworn to before me this
6th day of April, 1976.

Michael L. Colligan
Notary Public

Order Granting Plaintiffs' Motion for Leave to Amend the Summons and Complaint and Amending the Title and Article IV of the Complaint etc.

At a Term of the United States District Court for the Western District of New York held in the U.S. Courthouse, Buffalo, New York on the ______ day of April, 1976

PRESENT: HON. JOHN T. CURTIN
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil Action
No. 1972-325

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH

Plaintiffs

-vs-

EWALD P. NYQUIST, COMMISSIONER OF EDUCATION, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, JOSEPH MANCH, SUPERINTENDENT OF SCHOOLS OF THE CITY OF BUFFALO, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, STANLEY M. MAKOWSKI, MAYOR OF THE CITY OF BUFFALO, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO

Defendants

ORDER

The plaintiffs, having moved the Court, pursuant to 28 U.S.C. Section 1653, and Rules 15 and 19 of the Federal Rules of Civil Procedure, to amend the complaint and summons herein in various respects set forth in the motion of March 29, 1976 to the Court, and the matter having come on to be heard on April 14, 1976, and the defendants Ewald P. Nyquist, Commissioner of Education, The Board of Regents of the State of New York, and the members of the Board of Regents of the State of New York having appeared by Louis J. Lefkowitz, Attorney General, and having submitted the opposing affidavit of Jean M. Coon, Esq., Assistant Solicitor General, sworn to April 6, 1976, wherein, among other things, it is pointed out that Joseph T. King and Francis W. McGinley are no longer members of The Board of Regents, and the defendant Joseph Manch, Superintendent of Schools of the City of Buffalo, The Board of Education of the City of Buffalo, and the members of The Board of Education of the City of Buffalo and the present Superintendent of Schools of the City of Buffalo, Eugene T. Reville, having appeared by Leslie G. Foschio, Esq., Corporation Counsel of the City of Buffalo, and Louis J. Lefkowitz having been represented at the argument before the Court by Maryann S. Freedman, Esq., Assistant Attorney General, and in opposition to the plaintiffs' application, and Leslie G. Foschio, Esq., Corporation Counsel of the City of Buffalo, having been represented upon the oral argument by Anthony Gregory, Esq., Assistant Corporation Counsel, in opposition to the plaintiffs' application, and the plaintiffs having appeared through Richard F. Griffin, Esq. in support of the application, and the Court having had due deliberation and having determined that it is appropriate to grant the relief requested and the Court having found that no prejudice has been demonstrated to the defendants by granting the relief requested, it is

ORDERED, that the plaintiffs' motion for leave to amend the summons and complaint is granted; and it is further

Order Granting Plaintiffs' Motion for Leave to Amend the Summons and Complaint and Amending the Title and Article IV of the Complaint etc.

ORDERED, that the following named persons are made parties defendant to this action:

Eugene T. Reville, individually and as Superintendent of Schools of the City of Buffalo
Florence E. Baugh
Samuel E. Sacco
Joseph E. Murphy
Mozella Richardson
Dr. Matt A. Gajewski
Louis C. Benton
Michael J. Ryan
Joseph D. Hillery
Marilyn P. Kavanagh, individually and as member of the Board of Education of the City of Buffalo
Thomas M. Black
Carl H. Pforzheimer, Jr.
Alexander J. Allan, Jr.
Joseph C. Indelicato, M.D.
Kenneth B. Clark
Harold E. Newcomb
Willard A. Genrich
Emlyn I. Griffith
Genevieve S. Klein
William Jovanovich
Mary Alice Kendall
Jorge L. Batista
Louis E. Yavner
Martin C. Barell
Laura Bradley Chodos, individually and as member of The Board of Regents of the State of New York

ORDERED, that the title of the within action is amended as follows:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH

Plaintiffs

-vs-

Order Granting Plaintiffs' Motion for Leave to Amend the Summons and Complaint and Amending the Title and Article IV of the Complaint etc.

EWALD P. NYQUIST, INDIVIDUALLY AND AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THOMAS M. BLACK, CARL H. PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK, HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUIS E. YAVNER, MARTIN C. BARELL and LAURA BRADLEY CHODOS (INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF REGENTS OF THE STATE OF NEW YORK), JOSEPH MANCH, INDIVIDUALLY AND AS SUPERINTENDENT OF SCHOOLS OF THE CITY OF BUFFALO, EUGENE T. REVILLE, INDIVIDUALLY AND AS SUPERINTENDENT OF SCHOOLS OF THE CITY OF BUFFALO, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN, JOSEPH D. HILLERY and MARILYN P. KAVANAGH (INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF EDUCATION OF THE CITY OF BUFFALO), STANLEY M. MAKOWSKI, MAYOR OF THE CITY OF BUFFALO, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO

Defendants

ORDERED, that Article IV of the complaint is amended as follows:

DEFENDANTS

A. Defendant BOARD OF EDUCATION OF THE CITY OF BUFFALO, NEW YORK (hereinafter referred to as "THE BOARD") establishes policies, practices, customs and usages which are applicable to the governance of the public school system of the City of Buffalo, New York.

B. Defendants Florence E. Baugh, Samuel E. Sacco, Joseph E. Murphy, Mozella Richardson, Dr. Matt A. Gajewski, Louis C. Benton, Michael J. Ryan, Joseph D.

Hillery and Marilyn P. Kavanagh are the persons who hold the elective office of a member of the Board of Education of the City of Buffalo (hereinafter referred to as "the Board").

C. Defendant Joseph Manch has been appointed by the Board as Superintendent of the school system of the City of Buffalo, New York, and as such is the chief executive officer of the system. Defendant Eugene T. Reville is the successor to defendant Joseph Manch.

D. Defendant REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK (hereinafter referred to as "the REGENTS") establish the policies, practices, customs and usages which are generally applicable to public school systems in the State of New York. The REGENTS are charged by law with plenary power over the operation of the schools of the State of New York, including the selection of sites for school construction. The REGENTS are charged with an affirmative constitutional duty to exercise their powers so as to afford equal educational opportunities to all citizens, including the plaintiffs and the represented class.

E. Defendants Thomas M. Black, Carl H. Pforzheimer, Jr., Alexander J. Allan, Jr., Joseph C. Indelicato, M.D., Kenneth B. Clark, Harold E. Newcomb, Willard A. Genrich, Emlyn I. Griffith, Genevieve S. Klein, William Jovanovich, Mary Alice Kendall, Jorge L. Batista, Louis E. Havner, Martin C. Barell and Laura Bradley Chodos are the persons who constitute the REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK (hereinafter referred to as "the REGENTS").

F. Defendant EWALD P. NYQUIST is the chief executive officer of the State Education Department, appointed and serving at the pleasure of the REGENTS, and as such has general supervisory powers to implement the policies of the REGENTS and other laws of the State of New York applicable thereto.

ORDERED, that Article I of the complaint is amended as follows:

I

NATURE OF ACTION AND JURISDICTION

This is a civil action for declaratory judgment and injunctive relief under Title 42, United States Code, Sections 1981 et seq., including 1983 and other pertinent provisions thereof. Plaintiffs claim that defendants, while acting under color of state law, have deprived the plaintiffs and their class of rights guaranteed by the statutes of the United States and the Fourteenth Amendment of the United States Constitution by creating, maintaining, permitting, condoning and perpetuating racially segregated public schools in the City of Buffalo and the Buffalo Metropolitan area. Jurisdiction is based on 28 U.S.C., Sections 1343 and 2201.

ORDERED, that the summons, complaint, answers and all pleadings in the within action are deemed amended in accordance with the above.

U.S.D.J.

ENTER: April 30, 1976

Decision and Order Granting Plaintiffs' Motion to Amend the Complaint etc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, et al.

Plaintiffs

-vs- Civ-1972-325

EWALD P. NYQUIST, et al.

Defendants

APPEARANCES: RICHARD F. GRIFFIN, ESQ.
Buffalo, New York, for Plaintiffs.

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York (RUTH KESSLER TOCH, ESQ., Solicitor General, & JEAN M. COON, ESQ., Assistant Solicitor General, of Counsel), Albany, New York, and (EUGENE A. PANFIL, ESQ., Assistant Attorney General, of Counsel), Buffalo, New York, for the Commissioner of Education, and the Board of Regents of the State of New York, defendants.

LESLIE G. FOSCHIO, ESQ., Corporation Counsel of the City of Buffalo (ANTHONY GREGORY, ESQ., Assistant Corporation Counsel, & FRANK A. SEDITA, JR., ESQ., Assistant Corporation Counsel, of Counsel), Buffalo, New York, for Mayor Stanley M. Makowski, Superintendent of Schools Eugene T. Reville, The Board of Education, and the Common Council of the City of Buffalo, defendants.

Decision and Order Granting Plaintiffs' Motion to Amend the Complaint etc.

When this school desegregation suit was filed in June of 1972, the plaintiffs named the Buffalo Board of Education, Dr. Manch, the Superintendent of Schools, the State Board of Regents, and Mr. Nyquist, the State Commissioner of Education, as defendants. Later, the plaintiffs moved to amend their complaint to add the Common Council of the City of Buffalo and its members, and the Mayor of Buffalo as party defendants. By order dated April 29, 1974, this motion was granted.

The trial of this action was held in October of 1974. The State defendants for the first time in their post-trial brief (Post-Trial Brief for State Defendants, at 3-5), argue that the Board of Education and the State Board of Regents are not "persons" within the scope of 42 U.S.C. §1983, and, therefore, that the court lacks subject matter jurisdiction under 28 U.S.C. §1343(3) with respect to them. There is no question that Dr. Manch and Mr. Nyquist were properly named as parties.

In 1972, when this case was instituted, the law was clear that municipalities could not be sued for damages under §1983, since they were not "persons." Monroe

v. Pape, 365 U.S. 167 (1961). However, several court decisions interpreted Monroe to allow suits solely for equitable relief, such as the plaintiffs seek here, against municipalities. See Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961). This interpretation of the Monroe case was rejected in June 1973, when the Supreme Court decided the case of City of Kenosha v. Bruno, 412 U.S. 507 (1973). In that case, the Court stated:

> We find nothing in the legislative history discussed in Monroe, or in the language actually used by Congress, to suggest that the generic word "person" in §1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the court held in Monroe, "Congress did not undertake to bring municipal corporations within the ambit of" §1983, [365 U.S.] at 187, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under [28 U.S.C.] §1343.
> Id., at 513.

Since the Kenosha case, several courts have explicitly ruled that school boards are not "persons" under §1983. *See* *Monell v. Social Services of the City of New York*, Docket No. 75-7333 (2d Cir., March 8, 1976); *Adkins v. Duval County School Board*, 511 F.2d 690 (5th Cir. 1975); *Harkless v. Sweeny Independent School District*, 388 F.Supp. 738 (S.D.Tex. 1975).

The plaintiffs have now requested leave of this court to amend their complaint to add as parties-defendant in their individual and official capacities the present Superintendent of the Buffalo Schools, and the present members of the Buffalo Board of Education and the State Board of Regents.

The State defendants argue that this action by the plaintiffs will not cure the jurisdictional defect because of the recent Supreme Court case of *Rizzo v. Goode*, 44 U.S.L.W. 4095 (Jan. 20, 1976), which, in the State defendants' words, "held that for jurisdiction under §1983, it is necessary to have as parties defendant the *actual* persons or officials who *acted* to deprive plaintiffs of constitutional rights." (State Defendants' Affidavit in Opposition, at 2). In addition, the City and State attorneys state that since these individuals would now be sued in their individual capacities, they do not represent them.

The State defendants read too much into the Supreme Court's decision in Rizzo v. Goode, supra. The Supreme Court said in Rizzo that, before injunctive relief may issue to remedy the deprivation of constitutional rights, there must be a showing that the responsible authorities played an affirmative part in the deprivation of those rights. At trial in Rizzo, there was a showing that constitutional rights were violated, but no showing that the named defendants participated.

The situation in Rizzo is different from the instant case, where plaintiffs allege that the State and City defendants denied them the equal protection of the laws by creating and maintaining segregated schools in the City of Buffalo, and where, at trial, plaintiffs attempted to prove that the Board of Education, through various devices, had segregated and maintained segregation in the schools and the staffs of Buffalo Public School System, and that the State defendants, who have the responsibility under the New York Constitution for public education, allowed the segregation to continue. The Supreme Court itself noted this difference between school desegregation cases and cases like Rizzo, when it said that there is a

> . . . critical factual distinction between their case [Rizzo] and the desegregation cases decided by this Court. In the latter, segregation imposed by law had been implemented by state authorities . . . whereas in the instant case [Rizzo] the District Court found that the responsible authorities had played no affirmative part in depriving . . . any constitutional rights.
> Id., at 4100.

Therefore, the defendants' reliance on Rizzo is misplaced.

The Second Circuit in Monell, supra, has stated that "[t]here is no doubt that municipal and state officials, sued in their official capacities, are 'persons' within the meaning of §1983 when sued for injunctive or declaratory relief." (Slip Op., at 2420). There is a recognition here of the fiction inherent in the case of Ex Parte Young, 209 U.S. 123 (1908), in which the Supreme

Court ruled that although a state cannot be sued under the eleventh amendment, a suit can be maintained against a state official. The requirement of suing "persons" instead of municipalities or agencies under §1983 is a further extension of this same fiction. Although a school board itself cannot be sued, individual members can be. And, once the individuals are named, the suit proceeds as if it were against the school board as a separate entity. Indicative of this fiction is the statement of the Supreme Court in *Keyes v. School District No. 1*, 413 U.S. 189, 210-211 (1973):

> The courts below attributed much significance to the fact that many of the Board's actions in the core city area antedated our decision in *Brown*. We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

In other words, it is the actions of the school board, and not just the present board members, that are considered by the courts. If the law were otherwise, a school board or other entity could escape responsibility by a change of members whenever suits arose.

Federal Rule of Civil Procedure 15(a) states that "leave [to amend] shall be freely given when justice so requires." Rule 15(c) allows an amendment that changes the party against whom a claim is asserted to relate back to the date of the original complaint if the claim in the amended complaint arose out of the conduct set forth in the original complaint and

> the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Rule 19 states:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action, shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties . . . .

Rule 21 states:

> Misjoinder of parties is not ground for dismissal of an action. Parties may

> be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

In addition, 28 U.S.C. §1653 states:

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Most notably, in Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974), some minority students sued the Dade County School Board and its superintendent seeking injunctive and declaratory relief against the use of corporal punishment. At the end of the trial in the district court, the defendant motioned to dismiss under Federal Rule of Civil Procedure 41(b). The district court granted the motion.

The plaintiffs appealed and, at the circuit court, the defendant school board argued that the court was without jurisdiction, citing Kenosha, supra. The Fifth Circuit stated:

> The District Court should on remand grant the likely request of plaintiffs to add the individual members of the Dade County School Board as parties defendant.
> Ingraham, supra, at 252.

Decision and Order Granting Plaintiffs' Motion to Amend the Complaint etc.

In this case, had the individual defendants been properly named originally, the present members of the Board of Education and the Board of Regents would automatically have been substituted. Federal Rule of Civil Procedure 25(d). Given the fact that in 1972, when this suit was instituted, it was not clear that a school board was not a "person" under §1983, and given the fact that no defendant contested this point until the State defendants raised it in their post-trial brief, and that all defendants have been fully represented by counsel each step of the way, we feel that it would be a manifest injustice to deny the plaintiffs' motion. Plaintiffs have stipulated that they do not, and will not, seek attorneys fees from the defendants as private citizens in their individual capacities. Each individual defendant, as a member of either the Buffalo Board of Education or the New York State Board of Regents, is, and has been, fully aware of this lawsuit. As the Supreme Court stated in Mullaney v. Anderson, 342 U.S. 415, 417 (1952), a case in which the plaintiffs petitioned for leave to add two new party plaintiffs in the

Supreme Court, the Court stated:

> To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs to counter effective judicial administration - the more so since, with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below.
> Id., at 417.

Attorneys for the State and City defendants have indicated that no new offer of evidence will be forthcoming if this motion is granted. For all the reasons stated above, plaintiffs' motion to amend the complaint is granted.

So ordered.

Curtis

JOHN T. CURTIS
United States District Judge

DATED: April 30, 1976

Decision and Order Dated April 30, 1976.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM and WILHELMINA P. SEALES, JOHN MEDIGE, and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH

Plaintiffs

-vs-

Civ-1972-325

EWALD P. NYQUIST, individually and as Commissioner of Education of the State of New York, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THOMAS M. BLACK, CARL H. PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.D., KENNETH B. CLARK, HAROLD E. NEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUIS E. YAVNER, MARTIN C. BARELL and LAURA BRADLEY CHODOS, individually and as Members of the Board of Regents of the State of New York, JOSEPH MANCH, individually and as Superintendent of Schools of the City of Buffalo, EUGENE T. REVILLE, individually and as Superintendent of Schools of the City of Buffalo, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN, JOSEPH D. HILLERY and MARILYN P. KAVANAGH, individually and as Members of the Board of Education of the City of Buffalo, STANLEY M. MAKOWSKI, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO

Defendants

Decision and Order Dated April 30, 1976.

APPEARANCES: RICHARD F. GRIFFIN, ESQ.
Buffalo, New York, for Plaintiffs.

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York (RUTH KESSLER TOCH, ESQ., Solicitor General, & JEAN M. COON, ESQ., Assistant Solicitor General, of Counsel), Albany, New York, and (EUGENE A. PANFIL, ESQ., Assistant Attorney General, of Counsel), Buffalo, New York, for the Commissioner of Education, and the Board of Regents of the State of New York, defendants.

LESLIE G. FOSCHIO, ESQ.; Corporation Counsel of the City of Buffalo (ANTHONY GREGORY, ESQ., Assistant Corporation Counsel, & FRANK A. SEDITA, JR., ESQ., Assistant Corporation Counsel, of Counsel), Buffalo, New York, for Mayor Stanley M. Makowski, Superintendent of Schools Eugene T. Reville, The Board of Education, and the Common Council of the City of Buffalo, defendants.

Decision and Order Dated April 30, 1976.

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Decision and Order Dated April 30, 1976.

INTRODUCTION

This court's decision in this case comes after a long and arduous journey through a complex lawsuit, in which the plaintiffs charge the defendants with "creating, maintaining, permitting, condoning and perpetuating racially segregated public schools in the City of Buffalo and in the Buffalo Metropolitan area." (Complaint, at 1). Plaintiffs allege a cause of action under 42 U.S.C. §§1981 et seq.[1] and the fourteenth amendment to the United States Constitution.[2] They seek declaratory and injunctive relief under 28 U.S.C. §2201[3] and claim jurisdiction in this court under 28 U.S.C. §1343.

It hardly needs to be pointed out that the Constitution and the laws do not forbid all types of discrimination. The fourteenth amendment prohibits only discrimination carried out under color of law; private discrimination, however regrettable or reprehensible, is not actionable under it. Civil Rights Cases, 109 U.S. 3, 11 (1883); Shelley v. Kraemer, 334 U.S. 1, 13 (1948). This state action requirement presents no obstacle to the plaintiffs' case, since there is no question but that all the defendants are state agencies within the ambit of the

fourteenth amendment's protection. See United States v. Texas Education Agency, 467 F.2d 848, 863 (5th Cir. 1972)(en banc); Oliver v. Kalamazoo Board of Education, 368 F.Supp. 143, 157-58 (W.D. Mich.), aff'd 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975).

At this point in the lawsuit, the only question before the court is whether or not any or all of the defendants have acted in such a manner as to segregate the Buffalo Public School System [hereinafter BPSS]. The question of remedy, i.e., what action the court should take if it should find that the BPSS is segregated, is not before the court.

It should be emphasized that this court sits only as an arbiter of a legal dispute, not as a super-school board. It is this court's duty to safeguard the fourteenth amendment's guarantee of equal protection under the laws for all residents of the United States. The late Judge Murrah's words aptly describe the court's function in this lawsuit:

> We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a

proper subject for adjudication. Stapleton v. Mitchell, 60 F.Supp. 51, 55 (D.Kans. 1945), appeal dismissed, 326 U.S. 690 (1945).

At the outset, the court gratefully acknowledges the consistently professional cooperation exhibited by all parties to this lawsuit. One of the beneficial consequences of this cooperation was a series of 161 stipulations[4/] upon which all parties agreed before the trial in this action commenced. This, of course, considerably reduced the burden on this court once the trial actually began.

The complexity and scope of the issues before the court must not be understated, however. The question presented - whether or not the defendants intentionally committed segregative acts affecting the Buffalo public schools - is one that calls for the strongest of emotions.[5/] The final written record of this case gives some testimony to its complexity and to the fervor with which it was contested. Pretrial motions and discovery procedures consumed many months; the actual trial lasted ten days, with a transcript running 1,695 pages; parties submitted many pretrial and post-trial briefs; some 180 exhibits[6/] were admitted into evidence; and post-trial oral arguments were scheduled to facilitate a clear understanding of the positions and legal arguments of all parties.

It is, of course, the duty of this court to decide the facts from the evidence placed before it. Correlatively, it is the duty of this court to apply the law as it exists, both in the decisions of the Supreme Court and those of the Second Circuit in which this court sits. After carefully sifting through all the testimony, evidence, and argument, the court is now prepared to apply the applicable law to the facts as it finds them.

I. THE PARTIES AND THEIR POSITIONS

This suit was instituted as a class action, with the named individual plaintiffs, black and white parents of public school children in the Buffalo metropolitan area, attempting to represent all others similarly situated. Although a class action is appropriate under Federal Rule of Civil Procedure 23(b)(2), the court believes that since little evidence was presented at trial regarding non-BPSS policies and practices, the certified class should be restricted to parents of children attending Buffalo public schools.

Also plaintiffs are the Citizens Council for Human Relations, Inc., a non-profit corporation organized under the laws of the State of New York, and the National Association for the Advancement of Colored People, Buffalo branch, organizations which seek, among other things, equal opportunity in education.

The defendants are Ewald Nyquist, the Commissioner of Education in New York State, The Board of Regents of the State of New York and its individual members [State defendants], Joseph Manch, Superintendent of Schools of the City of Buffalo at the time this suit was brought, and Eugene Reville, the present Superintendent, the Board of Education of the City of Buffalo and its members, the Common Council of the City of Buffalo and its members, and Stanley M. Makowski, Mayor of the City of Buffalo [City defendants].

Originally, the plaintiffs did not name the individual members of the Board of Education or the Board of Regents. By order of this court dated today, the plaintiffs' motion to amend their complaint to include the individual members of these two Boards as parties defendant was granted.

The plaintiffs allege that the defendants, by various actions and inactions, have caused the BPSS to become or remain severely segregated. Among the major allegations are segregation of staff, siting and construction of schools so as to promote segregation, manipulation of school district lines, optional zones and transfers for segregative reasons, failure to implement any meaningful integration plan, failure to hire significant numbers of minority group teachers, failure to promote significant numbers of minority individuals to supervisory positions, and failure to fund the proposed new East Side High School. Numerous other actions and inactions are alleged, including segregation of residential areas, and student assignment which incorporated this segregation. As a result of these actions of the defendants, plaintiffs claim that they have been denied the equal protection of the laws guaranteed to all citizens by the fourteenth amendment.

The City defendants, while acknowledging that many of the schools are racially imbalanced, insist that any imbalances are due to demographic shifts in housing patterns that are beyond their control. In addition, they contend that no affirmative action is required of them by the Constitution to alleviate the imbalances so caused. In adhering to their long-standing neighborhood school policy, which they argue is and has been racially neutral, the City defendants deny that they have violated the plaintiffs' constitutional rights.

The State defendants likewise admit that widespread segregation exists in the BPSS, but insist that they have done more than is constitutionally required of them to end it. They also disclaim any responsibility for, or power to end, the segregated residential patterns in the City of Buffalo.

II. THE LAW

In 1954 the Supreme Court of the United States issued its famous decision in Brown v. Board of Education, 347 U.S. 483 (1954), which declared that laws requiring separate school facilities for blacks and whites - the separate but equal school doctrine - were unconstitutional. The Court ruled in that decision that such a system was "inherently unequal", and that such school segregation was a violation of the fourteenth amendment's guarantee of equal protection of the laws. 347 U.S., at 495. Although separate school facilities mandated by statute have long been outlawed in New York State,[7/] this did not effectively prevent the slow emergence of separate educational facilities, as shown in tables 3 to 7, infra.

The law to be applied in this case has evolved through a series of Supreme Court and circuit court cases since Brown dealing with school segregation in many cities of our country, both North and South.[8/] The essential elements, found in Keyes v. School District No. 1, 413 U.S. 189 (1973), a case which involved the Denver public schools, can be reduced to a series of questions:

(1) Have plaintiffs shown that any of the Buffalo public schools are segregated?[9]

(2) If the answer to the first question is yes, have plaintiffs shown that any of this segregation was brought about or maintained by _purposeful_ or _intentional_ segregative acts by the defendants?[10]

(3) If question number 2 is answered affirmatively, have plaintiffs shown that a _meaningful_ or _substantial_ portion of the school district was so segregated?

All parties agree that the Buffalo public schools exhibit severe racial imbalance (City Defendants' Answer, at 2; State Defendants' Answer, at 2), and that "[i]n recent years, the degree of racial isolation in the Buffalo public schools has been increasing." (S-11). The defendants deny, however, that the segregated condition of the BPSS was intentionally or purposefully caused by them. In other words, the defendants argue that the schools are _de facto_ segregated, not _de jure_ segregated. As the Supreme Court has explained in _Keyes_, "the differentiating factor between _de jure_ segregation and so-called _de facto_ segregation . . . is _purpose_ or _intent_ to segregate." _Keyes_, _supra_, 413 U.S. at 208 (emphasis in original).

In deciding the question of intent, the court is not required to find guilt or innocence, prejudice or evenhandedness, or even "badness" or "goodness" on the part of the defendants. To prove their case, plaintiffs are not required to show that racist motives prompted the defendants, nor even that defendants wanted the schools to be segregated, although proof of either of these would be sufficient to show the required intent. It is enough, as the Second Circuit explained in Hart v. Community School Board, 383 F.Supp. 699 (E.D.N.Y. 1974), aff'd 512 F.2d 37 (2d Cir. 1975), to show that the probable and foreseeable result of the defendants' acts was segregation. In Hart, the district court found that the school board had unconstitutionally segregated a school despite the court's specific finding that the school board was not racially motivated. The board appealed this decision. The Second Circuit stated:

> Unless the Supreme Court speaks to the contrary, we believe that a finding of de jure segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation. Hart, supra, 512 F.2d at 50.

Furthermore, it is not necessary that the plaintiffs prove that the defendants' every action was discriminatory or that no positive action was ever taken by the defendants to promote integration. We are not dealing with absolutes. Isolated actions of constitutionally insignificant effect, whether of a discriminatory nature or such as to avoid or alleviate segregation, are not determinative. If fourteenth amendment rights are being denied, plaintiffs are entitled to relief. *United States v. Texas Education Agency*, *supra*, 467 F.2d at 873.

In this regard, we note the words of the Sixth Circuit in *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975):

> When constitutional rights are involved, the issue is seldom whether public officials have acted with evil motives or whether they have consciously plotted with bigotry in their hearts to deprive citizens of the equal protection of the laws. Rather, under the test for de jure segregation, the question is whether a purposeful pattern of segregation has manifested itself over time, despite the fact that individual official actions, considered alone, may not have

> been taken for segregative purposes and may not have been in themselves constitutionally invalid. . . . Benevolence of motive does not excuse segregative acts.
> 508 F.2d at 182-83 (citations omitted).

Some of the actions and events considered in this lawsuit occurred before many, or in some cases any, of the present public school children first attended school. The passage of time alone does not wipe the evidentiary slate clean, however. The Supreme Court has stated:

> . . . We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."
> Keyes, supra, 413 U.S. at 210-11.

If the plaintiffs prove that some schools were intentionally segregated by the defendants, the court must then decide whether the plaintiffs have shown that a substantial portion of the school district was so segregated. If the plaintiffs have proved that the defendants intentionally segregated a substantial part of the school district, this "creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities." Keyes, supra, 413 U.S. at 208. It is then incumbent on the defendants to prove that the other segregated schools are not the consequence of their illegal segregative actions as well. The burden so imposed on the defendants is considerable. Mere reliance on an "allegedly logical, racially neutral" course of action is insufficient. The Supreme Court has explicitly enunciated the standard:

> [The defendants'] burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions.
> Keyes, supra, 413 U.S. at 210.[11]
> (Emphasis added).

III. BUFFALO AND ITS PUBLIC SCHOOLS

Buffalo's growth pattern has been similar to many other large cities of the northeast. Although the physical boundaries of the City of Buffalo have not changed significantly since the middle of the 19th century (PX 260, Pt. II, at 1), the population did not stop growing until a century later in 1950. In the quarter century since, the City has exhibited a steady population decline, due in large part to the familiar suburban migration.[12]

Many immigrants were attracted to Buffalo in the late 1800's, and the City retains strong ethnic concentrations to this day. The black population of Buffalo, negligible around the turn of the century, has grown steadily since World War I, receiving a strong impetus from the economic growth occasioned by the war industries during the 1940's.[13] As is typical of northern cities, the older central city has long been the locus of the black population, with movement slowly taking place to other areas of the city over the last two decades. Although some diffusion of black families throughout the

43 square miles of Buffalo has occurred, the number of blacks in suburban areas has been, and is, negligible.

The segregated nature of Buffalo's suburbs is glaringly evident when area public school districts are compared. The New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education reported in 1972 that

> [Buffalo's] surrounding suburbs are severely segregated. Of the 30 Erie County school districts, only six have over 1 per cent nonwhite students. Of these six, the only two districts with significant nonwhite student populations are Buffalo (46.6 per cent) and Lackawanna (19.2 per cent). Akron, with a sizeable Indian population, has the third highest nonwhite population, representing 16 per cent of the total. (PX 305, at 4.44)[14] (Footnotes omitted).

As the City's population has dropped, the minority percentage has correspondingly increased, as shown in the following table.

TABLE I

POPULATION CITY OF BUFFALO

YEARS	TOTAL	% NON-WHITE
1950	580,132	6.5
1960	532,759	13.8
1970	462,768	21.0

SOURCE: PX 263, at 5; S-9.

At the same time, the BPSS has recorded a similar drop in its pupil population, with an even more striking percentage increase in non-white members,[14a] as the following table shows.

TABLE 2

BPSS STUDENT POPULATION

YEARS	TOTAL	NON-WHITE	% NON-WHITE
1966	72,963	25,486	35%
1970	70,300	28,692	40.8%
1973	61,060	27,949	45.8%

SOURCE: PX 6, at 6.

The difference in years 1970 and 1973 is illustrative of this phenomenon - *i.e.*, the population, in absolute numbers, of minority public school children decreased, yet the minority percentage increased.[15]

The population drop is naturally reflected in school attendance figures. During the years 1966 through 1973, only ten of Buffalo's seventy-three elementary schools experienced an increase in enrollment. The rest noted declines ranging from negligible to severe. Total enrollment in those years dropped over 11,000, a percentage decline of approximately 23% from the January 1966 totals. Minority enrollment declined during that period by 525, while majority enrollment dropped by over 10,000 students.[16]

As of the 1973-1974 school year,[16a] the BPSS consisted of 77 elementary schools,[17] 4 middle and 2 junior high schools, 7 academic and 6 vocational-technical high schools. The pupil population in October 1973 was 61,060, of whom 53.3% were white, and 46.7% were non-white. (S-10). The system has never been under mandate of law to operate a dual system along racial lines. In fact, New York State enacted an anti-segregation law for public schools in 1900.[18] Nevertheless, there exists substantial racial imbalance in the public schools. In 1973, 55 out of 77 elementary schools, 5 out of 6 junior and middle schools, and 7 out of 13 high schools were from 80 to 100% majority or minority, as tables 3 through 7 demonstrate. Statistics such as these prompted Commissioner Nyquist to state in April 1972 that "segregation [in the BPSS] is more severe now than it was seven years ago." [S-18(b)].

TABLE 3

ELEMENTARY SCHOOLS 80-100% MINORITY ENROLLMENT (OCT.1973)

SCHOOL (GRADES)	MINORITY	MAJORITY	TOTAL
6 (PK-6)	801 (100%)	0 (0%)	801
8 (PK-6)	777 (99.9%)	1 (0.1%)	778
12 (PK-6)	230 (100%)	0 (0%)	230
16 (PK-6)	178 (90%)	19 (10.0%)	197
17 (PK-6)	465 (99.4%)	3 (0.6%)	468
23 (K-5)	697 (91.8%)	62 (8.2%)	759
31 (K-8)	828 (99.2%)	7 (0.8%)	835
Build (former 32) (PK-6)	575 (99.7%)	2 (0.3%)	577
35 (Special)	76 (96.2%)	3 (3.8%)	79
37 (PK-8)	809 (99.9%)	1 (0.1%)	810
39 (PK-6)	927 (100%)	0 (0%)	927
41 (PK-6)	371 (100%)	0 (0%)	371
47 (PK-6)	272 (100%)	0 (0%)	272
48 (PK-5)	396 (99.7%)	1 (0.3%)	397
50 (Special)	99 (100%)	0 (0%)	99
53 (PK-6)	880 (99.9%)	1 (0.1%)	881
59 (K-5)	566 (98.3%)	10 (1.7%)	576
62 (K-7)	712 (92.5%)	58 (7.5%)	770

SCHOOL (GRADES)	MINORITY	MAJORITY	TOTAL
74 (PK-6)	626 (98.9%)	7 (1.1%)	633
75 (PK-6)	363 (100%)	0 (0%)	363
90 (K-6)	512 (89.3%)	61 (10.7%)	573
93 (K-3)	99 (100%)	0 (0%)	99

SOURCE: PX6 at 13-20 (Statistics); DX 3 (Grades).

TABLE 4

ELEMENTARY SCHOOLS 80-100% MAJORITY ENROLLMENT (OCT.1973)

SCHOOL	MINORITY	MAJORITY	TOTAL
11 (K-8)	43 (9.8%)	398 (90.2%)	441
18 (K-6)	43 (9.8%)	395 (90.2%)	438
19 (K-8)	70 (11.8%)	523 (88.2%)	593
26 (K-6)	32 (7.9%)	374 (92.1%)	406
27 (K-6)	4 (0.6%)	631 (99.4%)	635
28 (K-6)	70 (11.8%)	522 (88.2%)	592
29 (K-8)	43 (6.0%)	690 (94%)	733
30 (K-6)	13 (6.8%)	177 (93.2%)	190
33 (PK-6)	45 (8.7%)	471 (91.3%)	516
34 (K-5)	38 (13.4%)	245 (86.6%)	283
38 (PK-8)	83 (13.0%)	554 (87.0%)	637
43 (K-8)	27 (2.8%)	920 (97.2%)	947
45 (K-8)	83 (8.9%)	848 (91.1%)	931
49 (K-5)	14 (7.2%)	179 (92.8%)	193
51 (K-6)	40 (9.3%)	388 (90.7%)	428
52 (K-8)	54 (7.8%)	637 (92.2%)	691
60 (K-6)	13 (2.1%)	620 (97.9%)	633
63 (K-8)	86 (15.5%)	469 (84.5%)	555

SCHOOL	MINORITY	MAJORITY	TOTAL
65 (K-6)	51 (13.4%)	330 (86.6%)	381
66 (K-8)	74 (10.6%)	621 (89.4%)	695
67 (K-8)	44 (6.6%)	626 (93.4%)	670
69 (K-8)	57 (10.6%)	479 (89.4%)	536
70 (K-6)	6 (1.4%)	427 (98.6%)	433
71 (K-6)	63 (18.4%)	279 (81.6%)	342
72 (K-8)	9 (1.1%)	821 (98.9%)	830
77 (PK-8)	114 (15.1%)	640 (84.9%)	754
79 (K-4)	38 (11.9%)	282 (88.1%)	320
80 (K-8)	53 (16.5%)	269 (83.5%)	322
81 (K-8)	87 (12.8%)	595 (87.2%)	682
83 (K-5)	3 (2.3%)	127 (97.7%)	130
84 (Special)	40 (17.9%)	184 (82.1%)	224
86 (K-5)	26 (8.4%)	284 (91.6%)	310
88 (K-4)	4 (3.2%)	125 (96.8%)	129

SOURCE: PX6, at 13-20 (Statistics); DX3 (Grades).

TABLE 5

MIDDLE AND JUNIOR HIGH SCHOOLS
80-100% MINORITY-MAJORITY ENROLLMENT
(OCT. 1973)

SCHOOL	MINORITY	MAJORITY	TOTAL
Fillmore Middle	690 (89.0%)	85 (11.0%)	775
Clinton Junior	846 (100%)	0 (0%)	846
Genesee Humboldt Junior	932 (90.9%)	93 (9.1%)	1025
Southside Junior	202 (15.4%)	1107 (84.6%)	1309
Woodlawn Junior	764 (99.6%)	3 (0.4%)	767

SOURCE: PX 6, at 21.

TABLE 6

ACADEMIC HIGH SCHOOLS
80-100% MINORITY-MAJORITY ENROLLMENT
(OCT. 1973)

SCHOOL	MINORITY	MAJORITY	TOTAL
East High	1622 (99.0%)	17 (1.0%)	1639
Riverside High	232 (15.1%)	1301 (84.9%)	1533
South Park High	245 (12.7%)	1683 (87.3%)	1928

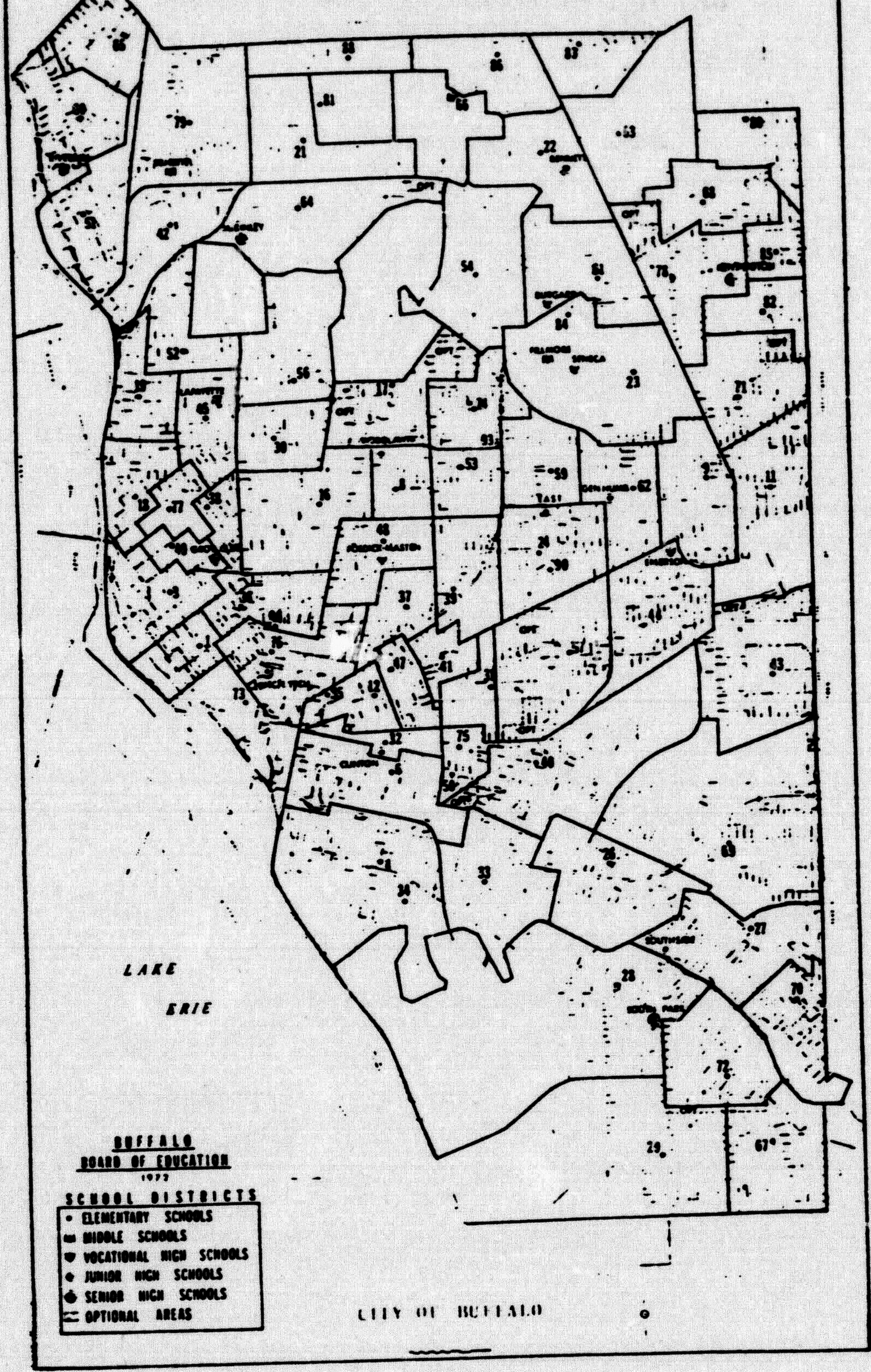
SOURCE: PX 6, at 22.

TABLE 7

VOCATIONAL-TECHNICAL HIGH SCHOOLS
80-100% MINORITY-MAJORITY ENROLLMENT
(OCT. 1973)

Fosdick-Masten	576 (98.1%)	11 (1.9%)	587
Hutchinson-Central Technical	223 (19.8%)	902 (80.2%)	1125
McKinley	235 (20.3%)	922 (79.7%)	1157
Seneca	222 (20.0%)	891 (80.0%)	1113

SOURCE: PX 6, at 23.


LAKE
ERIE
BUFFALO
BOARD OF EDUCATION
1972
SCHOOL DISTRICTS
• ELEMENTARY SCHOOLS
▬ MIDDLE SCHOOLS
▼ VOCATIONAL HIGH SCHOOLS
◆ JUNIOR HIGH SCHOOLS
● SENIOR HIGH SCHOOLS
OPTIONAL AREAS
CITY OF BUFFALO

MAP 1

The BPSS exhibits a complex combination of grade structures and feeder patterns. Elementary schools vary from pre-kindergarten or kindergarten through third, fourth, fifth, sixth, seventh, or eighth grades. Middle schools are fifth through eighth grades, junior high schools, seventh through ninth grades, and high schools ninth through twelfth grades. Depending on the grade structure of the individual elementary school, a child may remain in one grammar school for his complete elementary education, or progress to a second grammar school, a middle school, or a junior high school. For instance, Schools 16, 30 and 38 are all within a matter of blocks of each other on the city's near west side. A child attending School 16, a K-6 school, will proceed to Woodlawn Junior High School and then Grover Cleveland High School, while a child starting out at School 30, another K-6 school, will transfer to School 56 for seventh and eighth grades and then go to Lafayette High School, while a third child at School 38 will remain at that school from kindergarten through eighth grade and then go to Grover Cleveland High School.[19/] (PX 296, at 26; Record, Vol. VIII, at 21-22).

As a general rule,[20] pupils do not have a choice of elementary schools. They must attend the school in the district[21] in which they live. This is also true for the junior high schools, the middle schools and the academic high schools. However, it is not true for the vocational-technical high schools, which accept students from all over the city and have no district lines.

IV. THE TRIAL

For purposes of assessing the allegations of the plaintiffs, the court will analyze separately what it considers to be the major issues: East High School, the siting and districting of Woodlawn Junior High, the use of transfers, optional areas and redistricting of attendance zones, the vocational-technical high schools, staff segregation, the state integration mandate, and the housing segregation in Buffalo.

IV-A. EAST HIGH SCHOOL

There are seven academic high schools in the BPSS. Each of these schools has its own area from which it gets its students. The policy of the Board of Education has been, at least since 1956, that students living in a certain academic high school's district must attend that high school. (S-42). Any deviation from the Board's attendance policy requires authorization from the Office of Pupil Personnel Services, and "may only be granted for hardship, language, and voluntary integration." (S-42).[22/] The enrollments at the academic high schools as of January 1966 and October 1973 are shown in Table 8 below.

TABLE 8

ACADEMIC HIGH SCHOOL ENROLLMENTS 1966 and 1973

SCHOOLS	TOTAL JAN.1966	MAJORITY	MINORITY
Bennett	2050	1494 (72.9%)	556 (27.1%)
East	1818	157 (8.6%)	1661 (91.4%)
Grover Cleveland	1453	1289 (88.7%)	164 (11.3%)
Kensington	1999	1959 (98%)	40 (2%)
Lafayette	1522	1257 (82.6%)	265 (17.4%)
Riverside	1830	1804 (98.6%)	26 (1.4%)
South Park	2649	2494 (94.1%)	155 (5.9%)
	TOTAL OCT.1973		
Bennett	1606	899 (56%)	707 (44%)
East	1639	17 (1%)	1622 (99%)
Grover Cleveland	1139	674 (59.2%)	465 (40.8%)
Kensington	1923	1093 (56.8%)	830 (43.2%)
Lafayette	1152	664 (57.6%)	488 (42.4%)
Riverside	1533	1301 (84.9%)	232 (15.1%)
South Park	1928	1683 (87.3%)	245 (12.7%)

SOURCE: PX 6, at 22.

Although the outer boundaries of the BPSS have remained static for many years, the individual high school district lines that govern attendance zones have been altered many times. East High School is among those schools that have been redistricted.

Plaintiffs charge that through redistricting and language transfers, the defendants have increased and maintained the racial segregation at East High School. In assessing the evidence, this court is cognizant that "[w]hat is or is not a segregated school will necessarily depend on the facts of each particular case." Keyes, supra, 413 U.S. at 196.

1. REDISTRICTING

The stipulations indicate the following facts with regard to the redistricting of East High School:

1. The Board in May 1954 adjusted the East district so that students residing in an optional[23] area in the eastern sector of the district would thereafter not be given the option of attending East. The students in this optional area were "practically all white." (S-151).

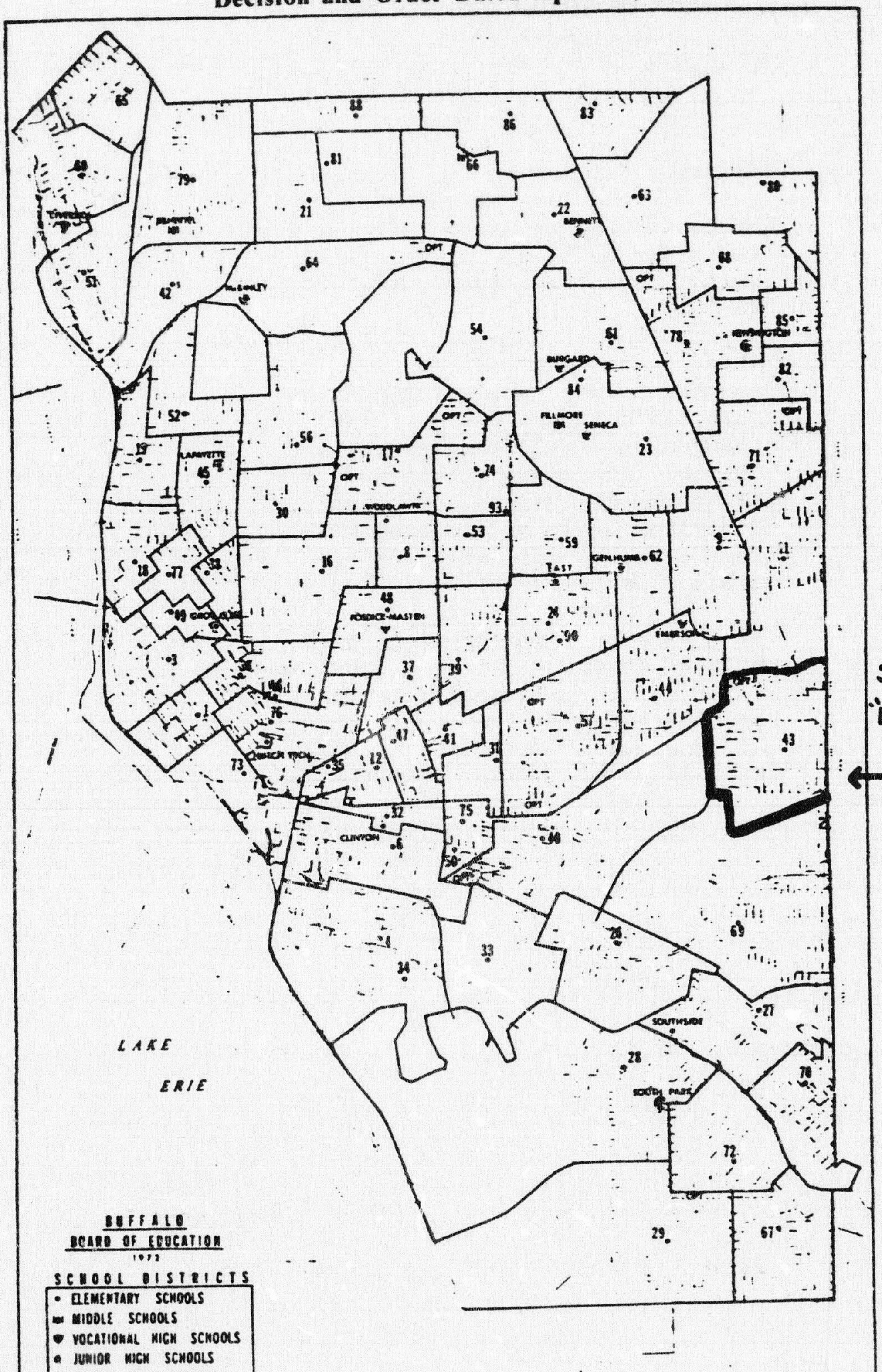
2. Another district adjustment by the Board at this time extended the East

district further south. The result of this was that some black students were required to go to East instead of the predominantly white South Park High School. (S-152).

3. Three years later, in May of 1957, another redistricting for East was authorized by the Board. This changed an area[24] then optional to Grover Cleveland, Bennett and Lafayette High Schools to East's district. Most of the students in this formerly optional area are black. (S-153).

4. At that same Board meeting, graduates of School 43 were assigned to South Park High School. School 43 students were predominantly white and the school was just as close to East as to South Park. (S-154-156).

The redistricting testimony at trial was not extensive, but it did flesh out the bare bones of the stipulations. S-151 and 154-156, paragraphs one and four, _supra_, deal with the same area, commonly referred to as the "Lovejoy" or "School 43" area. _See_ Map 2, _infra_. As of 1950, this section was part of the East High district. In July of 1951, it was declared an optional district, providing students residing in that area the choice of attending either East High on the west, or


BUFFALO
BOARD OF EDUCATION
1972
SCHOOL DISTRICTS
• ELEMENTARY SCHOOLS
MIDDLE SCHOOLS
VOCATIONAL HIGH SCHOOLS
JUNIOR HIGH SCHOOLS
SENIOR HIGH SCHOOLS
OPTICNAL AREAS
LAKE ERIE
CITY OF BUFFALO
43
OPT
BENNETT
BURGARD
FILLMORE
SENECA
KENSINGTON
McKINLEY
LAFAYETTE
GROVER
WOODLAWN
FOSDICK-MASTEN
EAST
GEN. HUMB.
EMERSON
CLINTON
SOUTHSIDE
SOUTH PARK

SCHOOL 43,
"LOVEJOY"
AREA

Kensington High on the north. In 1954, as paragraph one explains, the Lovejoy district was made a part of the Kensington High district. Three years later, in 1957, the students in the district were transferred to South Park High, as indicated in paragraph four, supra. Finally, in 1961, the Board reassigned this area to Kensington High. (Record, Vol. VII, at 103-105). The evidence indicates that this area has always been overwhelmingly white (PX 290; 291), and that it "is either closer to East High School - or at least equidistant to - than South Park." (S-156).

This redistricting of East High School,which resulted in the largely white Lovejoy neighborhood being excised from the East district, must be considered in conjunction with the language transfer policy in effect from 1960-1972.

2. LANGUAGE TRANSFERS

The language transfer exception was designed to allow a student to take advantage of a particular language curriculum that his district school did not offer. This special exception injects additional flexibility into an academic high school system already quite accommodating of students' language pursuits, since Board policy is to offer language courses "in each high school if there are [sic] a sufficient number of students who express a bonafide interest in taking such language." (S-46). Testimony at trial indicated that the minimum number of students required by the Board is fifteen. (Record, Vol. III, at 195-96).

Certain languages, such as Spanish, French and Latin, are apparently taught at all the academic high schools. Polish, Italian, Hebrew and Russian, however, the so-called "special languages," are restricted to selected high schools. (PX 264, at 545). A course in Polish was taught at East High School until about 1960, but, of the seven academic high schools, only East had none of these special language courses from approximately 1960 to 1972. (S-53, 54; PX 264, at 545; Record, Vol. IV, at 75).

The evidence shows that sometime in the early 1950's East High School was predominantly white. (Record, Vol. I, at 102). Although in 1970 the East High district had become approximately 60% black (PX 264, at 547), the court takes judicial notice of the well known fact,not disputed by the defendants, that the East High School district had long been, and still was in the 1950's and 1960's, populated by substantial numbers of persons of Polish extraction. Many Polish-Americans still live there. If there was any district in the Buffalo school system where a demand for Polish language classes existed, it was the East High School district and the Board of Education was well aware of this.[25]

It is not only a clearly foreseeable and natural consequence that curtailment of the language classes at East would induce transfers to other high schools, it is obvious that this result would occur. The evidence produced at trial corroborated this. Plaintiffs proved that many East district students obtained language transfers to study one of these special languages at another public high school, usually South Park or Kensington Highs. All of these transfers had to be authorized by the Student Personnel Services Office. They caused annual headaches for that office, which was inundated with transfer requests prior to the start of each school year.

As the following testimony of the head of the Student Personnel Services indicates, this situation was made known to the Superintendent of Schools.

> Q. Did you at anytime recommend to the Superintendent or to the Board of Education or to anyone that the languages that these students were asking to take be offered at East High School?
>
> A. Yes, I did. In fact, we constantly did . . . . So constantly we brought to the Superintendent's attention maybe these languages should all be put into East High School.
>
> Q. When would you recall that you first made that recommendation?
>
> A. Probably every year. Probably every year.
>
> Q. Every year. Would that be every year from 1965 when you assumed your position?
>
> A. Probably. Probably, yes.
>
> (Record, Vol. III, at 201-202).

The language transfers out of East were called to the Board's and to the Superintendent's attention by others also. At a Board meeting on May 26, 1971, Superintendent Manch was specifically informed that South Park High School alone had 143 out of district students, "generally from the East High School district," studying Polish and Russian. (PX 60, at 88-89). The possibility that language transfers were contributing to East's predominantly black enrollment was raised as early as 1963 in a report by the Civil Rights Commission of the United States. (PX 10, at 18). Noting that East High at that time was predominantly black, though the East district was not, the report suggested that language transfers were possibly being used by white students to transfer out of East.

The report pointed out the curious result of a 1957 adjustment in the Riverside High-Bennett High boundary. The area assigned to Riverside, previously optional between Riverside and Bennett, contained a substantial Jewish population. Shortly after this change was made, the Board of Education became aware that significant numbers of the new Riverside High students were transferring back to Bennett to take Hebrew. To avoid this, the Board instituted Hebrew classes at Riverside High School. (PX 10, at 17-18) The Board could have instituted the same policy with regard to East and the Polish language classes to avoid the transfers out of East High. That they did not is an indication that they did not want to.

The difficulty that the Board's transfer policy caused only serves to highlight the Board's attitude. When dealing with a system of seven academic high schools, it is inevitable that an action taken regarding one school's attendance policies will have a reaction on other schools. The language transfers out of East High for Polish and Russian contributed substantially to severe overcrowding at South Park High, and the Board was aware of this. (PX 60, at 64-67; 88-89). A past president of the Board, Mr. Arnold Gardner, testified that

> from time to time this [language transfers] arose at the Board. I would say it arose and received brief attention on only a few occasions. It was one of those items with which we are all familiar. It was one of those items that people mention and drop because they are embarrassed by it and from time to time it would be proposed that Polish be offered at East High School and there would be a series of knowing smiles around the table and after a moment's discussion, that would be abandoned.
> (Record, Vol. I, at 147).

It cannot be disputed that East is now, and has been at least since 1960, an identifiably black school.[26]

The Board attempts to rebut the plaintiffs' allegations that the Board caused East to become predominantly black by showing that the residential tracts surrounding East have become progressively more black as the years have passed.[27/] While it is certainly true that the East district population has exhibited a substantial shift from predominantly white to predominantly black, nonetheless, even in 1973 the minority district percentage was only about 60%, while East High was 99% minority - and had been over 90% minority for at least eight years. *See* Table 8, *supra*. It is obvious to the court that more than mere demographics caused this drastic effect. In 1966 East was already *the* black academic high school, with a student body 91.4% minority. By comparison at that time, Bennett stood at 73% majority, Lafayette at 83% majority, Grover at 89% majority, and Kensington, Riverside and South Park High Schools all over 90% majority. *Id*. Almost three out of every five black academic high school students in 1966 attended East High. (PX 6, at 5).[28/]

The Board admits that the language transfer policy contributed, in some degree, to East's racial imbalance. Furthermore, the head of the Student Personnel Services admitted, both on redirect and recross examination, that he believed that in many cases the language transfers were used to avoid attending East High School. (Record, Vol. VIII, at 101, 105). He also testified that there was no procedure whereby the central school administration monitored the transferring students to check whether or not they actually attended the requested language courses. (Record, Vol. VIII, at 90-91).

However, the Board denies that its language transfer policy was a substantial causative factor of East High's imbalance. The first hard statistics on the racial effect of transfers were not available until 1966. The following table shows the numbers of transfers, including language transfers, granted at East since that year.

TABLE 9

TRANSFERS FROM EAST HIGH

YEAR	TOTAL ENROLLMENT	MAJORITY ENROLLMENT	TRANSFERS GRANTED	MINORITY ENROLLMENT	TRANSFERS GRANTED
1966	1818	180 (9.9%)	73	1638 (90.1%)	39
1967	1814	112 (6.2%)	109	1702 (93.8%)	74
1968	1599	42 (2.7%)	129	1557 (97.3%)	91
1969	1696	27 (1.6%)	87	1669 (98.4%)	112
1970	1710	24 (1.4%)	176	1686 (98.6%)	114
1971	1343	2 (.2%)	51	1341 (99.8%)	102
1972	1393	23 (1.7%)	9	1370 (98.3%)	7
1973	1638	23 (1.4%)	2	1615 (98.6%)	6

SOURCE: DX 8.

The City defendants argue:

> [H]ow can such a racially imbalanced school, 90.1% black, in 1966, have been substantially affected by a policy that had no known racial impact on said school until some two years later?
> Post-trial Brief for City Defendants, at 22.

The court finds this logic difficult to follow. Merely because cold raw data on the racial effect of transfers was unavailable prior to 1966 does not mean that this racial effect was not discernible prior to this date. The Board was aware that language transfers could produce this effect, as shown by the Riverside-Bennett experience; it was warned that it was producing this effect in 1963; and it was obviously cognizant that East High's district contained many Polish speaking families. East was the only high school that offered no foreign languages from 1960 to 1972.

A brief examination of Table 9, supra, indicates that the segregative effect of transfers out of East, including language transfers, was substantial during those years, and from all the evidence the court can infer that it was substantial prior to those years. In 1967, as

Table 9 shows, 112 majority students attended East while almost as many, 109, transferred. In 1968, only 42 white students attended while 129 transferred. In 1969, 27 attended and 87 transferred; and in 1970, 24 attended while 176 transferred. Although Table 9, supra, does not indicate the percentage of transfers granted for language study, it was admitted that as of October 1972, 197 white students from East High's district were studying languages at South Park. (S-56).

In addition to what these stark numbers show in terms of an annual effect, there is a certain cumulative impact to consider, since each student who transfers can remain at the transferee school for the duration of his high school career. That there were no definite statistics available prior to 1966 does not prohibit this court from concluding, in light of all the circumstantial evidence, that the language transfer device produced a substantial adverse racial impact on East High School before 1966.

On July 6, 1972 the Board ordered that a full range of foreign languages be offered at East High, and that no more language transfers out of East be permitted. (S-58). At trial, the Board of Education introduced evidence tending to show that in 1972-73, the first school year that language transfers were ended, most of the white students who should have attended East High School did not.[29/] Since these East district residents could not avoid East through the language transfer device, the Board suggests that other subterfuges, such as false addresses, were apparently devised to thwart the Board's attendance policy. The essence of the Board's defense is that nothing the Board of Education or the City could do would force white students to attend East High School.[30/]

It is no excuse for the Board to say that whites shunned the school in 1972 after the Board had aided, abetted and helped to cause the attitudes that prompted this "white flight" from East High. Neither the Board of Education nor the City Council, nor even the Commissioner of Education can in candor deny that they had knowledge that East was becoming identifiably black throughout the late 1950's and early 1960's. The possibility that language transfer out of East was leading to East's racial imbalance was raised as early as 1962, and this problem was repeatedly called to the attention of the Board and the Superintendent of Schools. For the Board to argue that when it ended the language transfers in 1972, no effect on the racial imbalance at East High School resulted, puts its good faith in question. The language transfers encouraged the concentration of minorities in one out of the seven academic high schools.

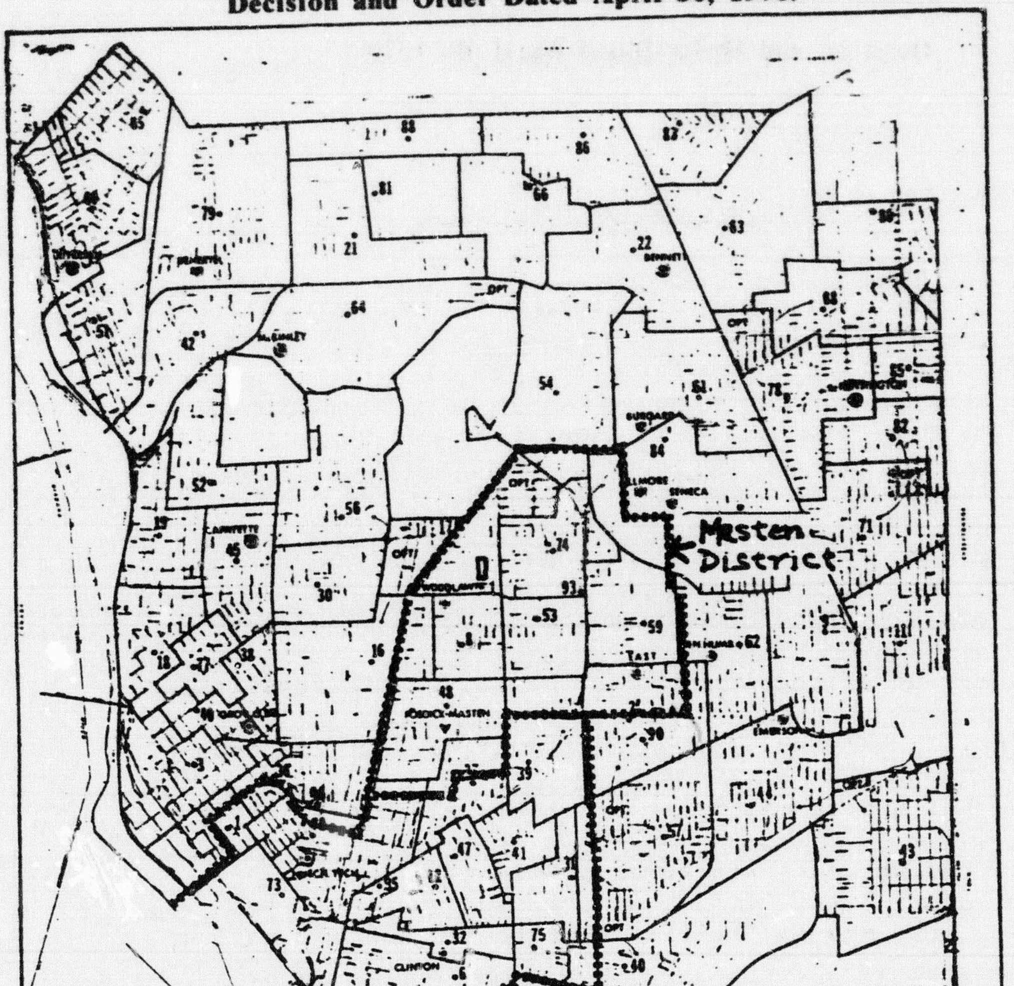
Finally, the Board argues that the stipulations which the Board agreed to and the evidence regarding the redistricting of East are so lacking in detail that they are void of evidentiary value, and that any increase in the minority population at East at the time of the redistricting could only have served to integrate that school. Even assuming that the Board is correct on the redistricting evidence, the deletion of special languages from the East curriculum in 1960 and the subsequent language transfers effectively nullified whatever integration had been achieved.

The racial impact of the language program was clearly foreseeable. In addition, and more important, the failure of the Board to amend this policy when it was obviously aware of its segregative impact is indicative that the Board intended that that segregative effect continue.

IV-B. WOODLAWN JUNIOR HIGH SCHOOL

The siting and districting of Woodlawn Junior High School, hotly debated issues for nearly two decades, are alleged by plaintiffs as clear examples of purposeful racial segregation. The City defendants argue that economic and demographic considerations required the North Masten District site on Woodlawn Avenue, and that the racial makeup of the school was the inevitable result of residential patterns beyond their control. It is uncontested that the school has been nearly all black throughout its twelve-year existence. [S-24(b)].

The Masten District experienced a great influx of population during the 1950's, due in substantial part to the Ellicott District Redevelopment which resulted in the relocation of many black families in the Masten District. As a consequence, severe overcrowding of the public elementary schools in that area of the city occurred. (PX 34, at 28-29; PX 124, at 36).[31] Consistent with a previously devised master plan for junior high schools, the decision was made to construct a junior high to alleviate the situation. (PX 32, at 537-8).


Masten District
Ellicott District
LAKE ERIE
McKINLEY
BENNETT
LAFAYETTE
FOSDICK-MASTEN
FILLMORE
SENECA
BURGARD
EAST
EMERSON
CLINTON
SOUTHSIDE
SOUTH PARK
OPT
BUFFALO
BOARD OF EDUCATION
1972
SCHOOL DISTRICTS
ELEMENTARY SCHOOLS
MIDDLE SCHOOLS
VOCATIONAL HIGH SCHOOLS
JUNIOR HIGH SCHOOLS
SENIOR HIGH SCHOOLS
OPTIONAL AREAS
CITY OF BUFFALO

Several sites were considered for the new school, but apparently only two were given serious consideration by the Board and the Common Council. The first was the area of Northland, Purdy and Alexander Streets; the second, on Woodlawn Avenue, was the old Offermann Stadium, the home of the City's minor league baseball team. Both of these sites are in the North Masten district. See Map 3, supra.

Controversy raged in 1958 over the site selection, with some citizens arguing that the Offermann Stadium-Woodlawn Avenue site would inevitably lead to an all black school. In a Board meeting December 10, 1958, concerned citizens presented their views. Among those who spoke against the Woodlawn Avenue site was Mr. Frank Caldwell, representing a committee of citizens, who urged that the school be constructed in a site conducive to an integrated facility:

> [W]e do staunchly urge that this Board . . . commence right now to accept the fact that residential segregation creates an educational problem, which must be faced by this Board.
> (PX 32, at 537).

The then Chairman of the Board, Paschal Rubino, stated that the Board had never considered race in its decisions, that it always considered only the needs of the City's children, and that "frankly, some of the apprehensiveness that exists at this point by your group, has never been a consideration of this Board." (Id., at 537). Mr. Caldwell replied: "That is the basis of our complaint." (Id.)

In addition to Superintendent Manch and Mr. Rubino, the late Councilwoman for the Masten District, Cora Maloney, and two local ward supervisors, Mr. Delmar Mitchell and Mr. F. Cecil Brown, among others, spoke in favor of the Woodlawn Avenue site. (Id. at 5383-84, 5393). These proponents of the Woodlawn Avenue site, all leaders in the black community, expressed reservations, but finally agreed for the reasons stated by Mrs. Maloney:

> I wish that it could be at a different place, but if it can not be at a different place than the Offermann Stadium, and the children must have education, and the children are the innocent victims because the adults have situated and located there, then I rise or fall by the children of the Masten District. (Id. at 5371-2).

The Board voted unanimously to recommend the Offermann Stadium-Woodlawn Avenue site, and the Common Council, on Mrs. Maloney's resolution, unanimously approved it. Chief among the reasons cited by the Board were demographic changes - "[W]e must build schools where there are children. There is no other way you can approach it," (Rubino, Id., at 5374), and economic forces - fewer families would be displaced; lost property taxes would be much less; time of construction would be considerably shorter; site acquisition costs would be lower. (PX 34, at 29).

There was evidence tending to show that this siting of the new junior high school guaranteed that it would be segregated because potential feeder schools mentioned at that time were predominantly black. But influential black leaders, like Mrs. Maloney, Mr. Mitchell and Mr. Brown, who supported the Woodlawn site, apparently were convinced that regardless of the difficulties the site presented, the possibility of an integrated school was not foreclosed. As the court's discussion of the districting of Woodlawn shows, infra, the statements of Board members and the Superintendent encouraged their belief that the school would be integrated. They also apparently considered that economic and demographic reasons were sufficiently compelling to accept the Woodlawn Avenue site.

Although it is a close question, it is the court's opinion that this conflicting evidence is not sufficient to show racially segregative intent on the part of the City or the State defendants with respect to the siting of the Woodlawn Junior High School. As the court weighs the evidence, the siting of the school on Woodlawn Avenue was not a virtual guarantee of segregation, and it cannot be said "that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation." Oliver v. Michigan State Board of Education, supra, 508 F.2d, at 182.

However, the same conclusion cannot be reached with regard to the districting decision that was made six years after the siting. During the debate on the site selection for Woodlawn, the following statements were made concerning the possible configuration of the school's attendance zone:

MR. RAND, a Board member:

> Now, that particular site [Woodlawn Avenue site] is nearer to the center of that area, which I think is made up of not just one race or one group - it's quite an all embracing area, particularly the area stretching on the other side of Main Street,[32] so that is another matter.
> (PX 32, at 5375).

SUPERINTENDENT MANCH:

> Now, it is not unlikely - let me say it in that way, it is not unlikely that by placing the school in the Offermann site [Woodlawn Avenue], rather than the original site proposed, we may have a more integrated situation than would have been possible with the other arrangement, simply because the school is now suggested in a place a little bit further west - practically at Main Street, you might say. (Id., at 5378).
>
> [W]e have no intention of being part of any movement to create a so-called segregated school, and that we would be conscious of this and do everything possible to make it a school which would be as integrated as the schools in that particular area can be. (Id., at 5379).

The Civil Rights Commission Report in 1963 stated:

> Dr. Manch holds out hope that Woodlawn Junior High School will be an integrated school. "The zone will cross Main Street

> if I have anything to say about it,"
> he declares.
> (PX 10, at 41).[33]

In a June 1962 letter,[34] Superintendent Manch had stated:

> A careful study precedes any establishment of new school districts or redistricting of school boundaries to be certain that the best possible pattern of integration may be effected despite the difficult problems which may be posed by housing.
> (PX 10, at 74).

Six years after the siting decision, push came to shove, as it were. After years of theorizing and analyzing, a final decision on the new school's attendance zone had to be made. The Board provided the forum for citizens to express their opinions, and heated public discussion occurred. Several districting proposals were bandied about by various Board members, the effects of which were racial ratios ranging from almost exclusively black to a 64-36 white majority. (Record, Vol. III, at 174). In addition, an alternative plan was proposed by which Lafayette High School would be utilized for the new junior high, and the new facility on Woodlawn would be used as a high school. [S-26(c); PX 34, at 1].

Board consideration of the districting question stretched over several meetings. Among the topics discussed at those meetings was the fact that between the date of the site selection in 1958 and the Board discussion of districting in 1964, the State Board of Regents had announced its policy on integration in the public schools of New York State. (PX 28, pt. II, at 11-12).

At a Board meeting February 26, 1964, Superintendent Manch read to the Board a statement that then Commissioner of Education James Allen had made October 28, 1963:

> As a matter of policy, the State Education Department believes de facto segregation.to be a detriment to the provision of equal educational opportunity. The Department further fervantly [sic] hopes that local authorities will deal with the elimination of de facto segregation, that the responsibility will be accepted at the local level. . . . Therefore, if appropriate local action is not forthcoming, if adequate plans are not made and actively pursued by local authorities, the state, in faithfulness to its responsibility, will have no choice but to act to move to fill the vacuum created by inertia or postponement in the exercise of local responsibility.
> (PX 122, at 22-23).

One month later, referring to the Commissioner's statement, Dr. Manch told the Board members:

> At no time did he [Commissioner Allen] term these statements "mandates" but they were interpreted as such throughout the state. Indicative of this, most of the large cities have already taken positions and acted on various proposals.
> (PX 124, at 36).

At the Board meeting on the 26th of March, 1964, Mr. Parlato, a Board member, submitted a written resolution that would district Woodlawn Junior High School with the result that the school would be 99% black. [PX 34; PX 124, at 31-47; S-24(b)]. Board members Wright and Nitkowski had not been informed of this resolution prior to the meeting; Dr. Manch heard about it accidentally a day previous to its submission. (Record, Vol. III, at 176; PX 34, at 26; PX 124, at 31). During discussion on the proposal, Dr. Manch advised the Board:

> [I]t is not now feasible, from the point of view of sound education and administration, in view of everything that has happened, in view of all the factors, it is not now feasible, I believe, to draw the district lines for Woodlawn in such a way as to achieve a racial balance that

> would be meaningful or stable. I don't
> think there is any middle ground in it
> any more.
> (PX 124, at 36).

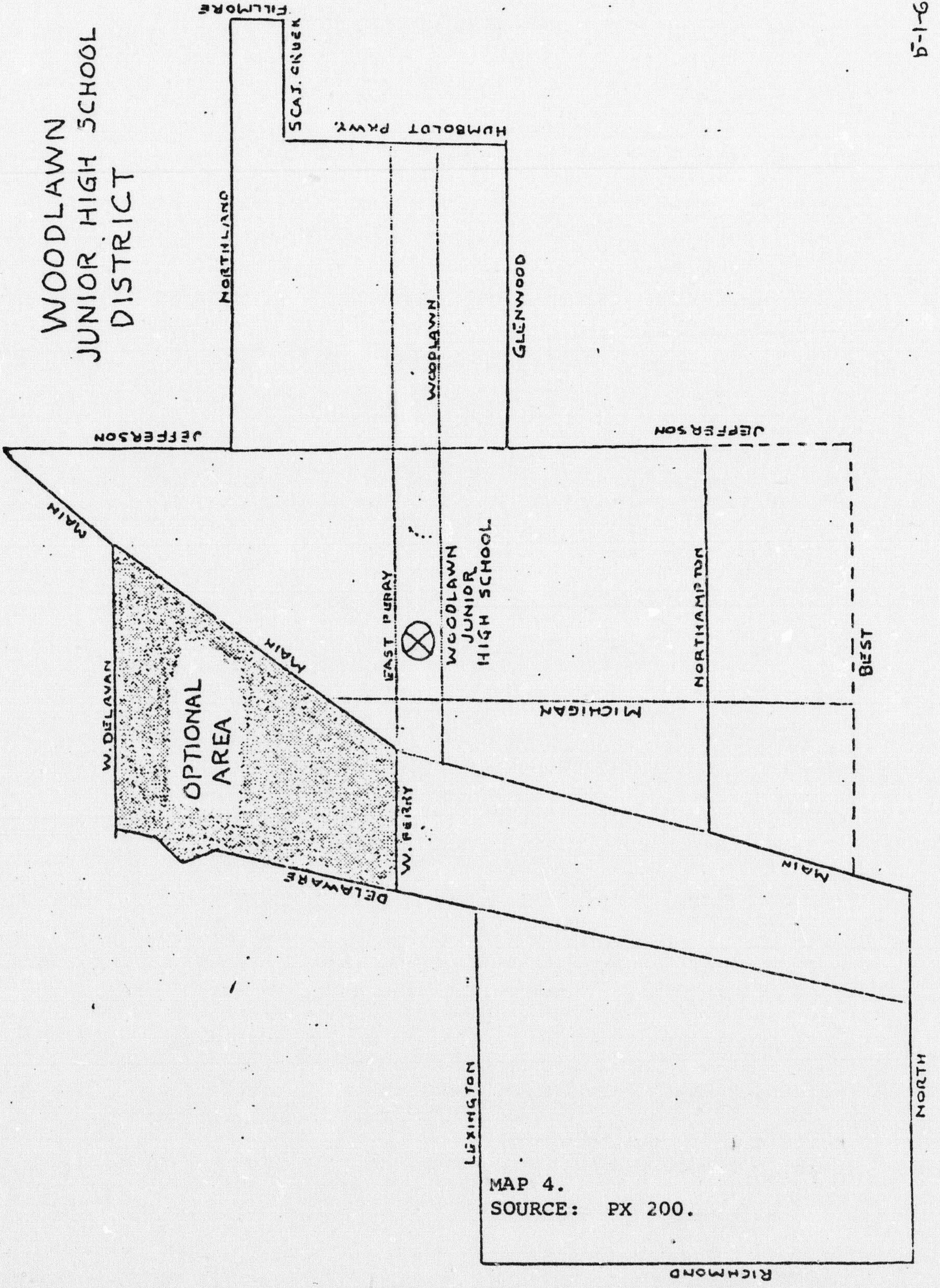
Dr. Manch did not set out the specifics of why it was not feasible to avoid a totally segregated school. Among the factors he evidently was referring to when he stated "in view of everything that has happened," was a petition with ten thousand signatures submitted to the Board in 1963, by white parents living west of the Woodlawn school site, protesting the possible inclusion of their area in the Woodlawn district [PX 264, at 646; S-26(b)(ii)], and the atmosphere of the weeks previous to March 26, which he had referred to as "akin to panic." (PX 124, at 33).

The Board voted in favor of the Parlato districting scheme six to one. (PX 124, at 47). The sole dissenting vote was cast by Dr. Lydia Wright, the only black Board member, who had proposed both a districting scheme that would have avoided a segregated school and who also had supported the alternative plan involving switching Lafayette High School and the new junior high school.

The final district plan for Woodlawn Junior High did extend west of Main Street, thus encompassing predominantly white neighborhoods, but a considerable portion of the district west of Main was made an optional zone, allowing students residing there the choice of attending School 56 or Woodlawn Junior. [S-27(b)(3)]. See discussion of optional areas, Section IV-C(2), infra. The remaining portion of the Woodlawn district west of Main was not made optional, but the evidence showed that many students residing in this area (see Map 4, infra) avoided Woodlawn Junior by transferring to predominantly white schools. See discussion of transfers, Section IV-C(1), infra. The racial composition of Woodlawn Junior High School has not changed measurably in the twelve years since that vote.[35]

The evidence is overwhelming that the action of the Board, in approving the Parlato districting plan for Woodlawn Junior High, was done with full understanding that the result would be a school student body almost totally black, and that this was the desire of the Board.

This is not a case of "mere inaction . . . allowing a racially imbalanced school to continue." Hart


WOODLAWN
JUNIOR HIGH SCHOOL
DISTRICT
FILLMORE
SCAJ. CREEK
HUMBOLDT PKWY.
NORTHLAND
WOODLAWN
GLENWOOD
JEFFERSON
JEFFERSON
MAIN
MAIN
MAIN
EAST FERRY
WOODLAWN
JUNIOR
HIGH SCHOOL
NORTHAMPTON
BEST
MICHIGAN
W. DELAVAN
OPTIONAL
AREA
W. FERRY
DELAWARE
LEXINGTON
NORTH
RICHMOND

MAP 4.
SOURCE: PX 200.

v. Community School Board, supra, 512 F.2d, at 48. Rather it is an example of blatant segregative intent with clear segregative results. Woodlawn Junior High School was part of the Board's master plan for junior high schools throughout the City.[36] The Board was operating on a clean slate when it decided the district boundaries for this new school. The City defendants attempted to argue that once Woodlawn was constructed the resultant racial makeup was inevitable, and that the district chosen was "tight" and "well defined." (Post-trial Brief for City Defendants, at 28). Yet, the defendants' failure even to attempt to explain away the other zoning proposals that would have avoided an all black school belies this stance. Also, the defendants' failure to call Superintendent Manch, Mr. Parlato or any of the other principal figures to the districting decision, supports the inference that their testimony would not alter the conclusion the evidence leads the court to make. The court finds that the Board willfully and intentionally caused Woodlawn Junior High School to be districted so as to be a segregated school.

IV-C. TRANSFERS AND OPTIONAL AREAS

The basic attendance policy of the BPSS is rigid - it requires each pupil to attend the school in the geographic zone in which he lives. (S-42). All schools in the system, with the exception of the vocational-technical high schools, follow this rule. (S-95). As is the case with most rules, however, there are several exceptions which allow a child to attend a school outside his geographically assigned school. The major exceptions follow.

1. Special course offered - a student is allowed to transfer to another school offering a course his own school does not feature. This is best exemplified by language transfers. See section IV-A(2) of this opinion, *supra*.
2. Medical necessity - physical and psychological reasons may be grounds for transfer.
3. Hardship - this exception makes allowances for families with special problems that make it difficult for the child to attend his ordinary school.
4. School adjustment - this exception apparently encompasses transfers to a different school when a child, for one reason or another, has had

difficulty with teachers or other students in his original school.

5. Harassment - if the child has been the victim of physical or psychological abuse from other students, a transfer is sometimes allowed.

(Record, Vol. VIII, at 27).

6. Voluntary integration - inner city students are allowed to attend peripheral schools outside their normal attendance zone.

(Record, Vol. VII, at 108-109).

7. Optional areas - students residing in certain geographical areas are granted the privilege of attending a school outside their normal school district.

(S-34).

The plaintiffs charge that the Board defendants have manipulated the transfer rules and optional areas to effect segregative results.

1. TRANSFERS

Plaintiffs put into evidence over 70 transfer requests that were granted in the years 1968 - 1973. (PX 51; Record, Vol. IV, at 23-46). Among the specific reasons for granting the transfer requests, as stated by school officials on the transfer forms, were fear of black children and avoidance of Woodlawn Junior High School. On many of the forms, no reason at all is stated for granting the requested transfer. Although not all of these transfers adversely affected the racial balances of the schools involved, many involved transfers out of predominantly black schools to predominantly white schools. (S-50, 51, 52, 60). It was also stipulated by the parties that, in addition to official transfers granted by the Office of Pupil Personnel Services, some principals of schools peripheral to predominantly black schools granted unofficial transfers. (S-49).

Because of the different feeder patterns and grade structures, such transfers have potentially double and triple segregative ramifications. For example, School 16 students feed into Woodlawn Junior High School. On the other hand, students attending School 30, a few blocks away, feed into School 56 for grades seven and eight, and then go to Lafayette High School. (PX 296, at 26). So, a student avoiding black School 16 by transferring to School 30 is able to also avoid the nearly all black Woodlawn Junior High. Board officials were aware that the avoidance of Woodlawn Junior High prompted some transfers. (Record, Vol. IV, at 12-13).

Table 10 shows the racial makeup of three elementary schools located on Buffalo's near West Side. All three of these schools are within blocks of each other, and none is in a predominantly black residential area.

TABLE 10

SCHOOL 16	MINORITY	MAJORITY	TOTAL
1962	149 (61%)	94 (39%)	243
1968	332 (91%)	33 (9%)	365
1973	178 (90%)	19 (10%)	197
SCHOOL 30			
1962	0 (0%)	189 (100%)	189
1968	23 (9.4%)	222 (90.6%)	245
1973	13 (6.8%)	177 (93.2%)	190
SCHOOL 38			
1962	12 (2.5%)	463 (97.5%)	475
1968	55 (8.2%)	616 (91.9%)	671
1973	83 (13%)	554 (87%)	637

SOURCES: 1962 figures from PX 10, at 52-53;
1968 figures from DX 6, at 2, 4, 6;
1973 figures from PX 6, at 13-15.

School 16's district extends one block east of Main Street, into a predominantly black area, but it also extends seven blocks west of Main Street, a predominantly white area. (Record, Vol. I, at 162; PX 1). Although School 16's district is predominantly white, the school, at least for the last decade, has been predominantly black, a situation one witness described as "anomalous." (Record, Vol. I, at 164). It is stipulated that in 1972 twenty-seven students from the School 16 district were attending School 30, and fifteen from School 16's district were attending School 38. (S-51, 52).

Table 11 reflects the following facts about Schools 4 and 34: School 4 is heavily minority, School 34 is even more heavily majority, and the imbalances at both schools have become more disparate since 1962.

TABLE 11

SCHOOL 4	MINORITY	MAJORITY	TOTAL
1962	339 (47.3%)	374 (52.7%)	713
1968	516 (78.2%)	144 (21.8%)	660
1973	545 (73.2%)	199 (26.8%)	744
SCHOOL 34			
1962	43 (15.6%)	232 (84.4%)	275
1968	30 (11.3%)	235 (88.7%)	265
1973	38 (13.4%)	245 (86.6%)	283

SOURCES: PX 10, at 52-53; DX 6, at 1, 5; PX 6, at 13, 15.

What the table does not show is that these two schools are in one school district, that they are a few blocks from one another, that they have the same principal, that the Board considers School 34 to be an annex to School 4, that School 34 was built in 1863, and that School 4 is so under utilized that all the students in School 34 could easily be accommodated there. (PX 47, at 2; Record, Vol. III, at 23, 25, 26, 103; PX 263, at 63).

Defendants argue that this is not a case of segregative action by the Board because the two schools are separated by a railroad track and the student population at both schools very nearly mirrors the populations of the respective neighborhoods the schools serve. (Record, Vol. III, at 103, 106, 109-110). The flaw in the defendants' logic is that this argument fails to take into account that in 1970-1971, for example, 38 minority students from School 34's area were attending School 4, and 41 white students from School 4's area were attending School 34. (Record, Vol. III, at 24). According to the HEW review, the principal of the schools cited three reasons for these transfers: suspensions (an unknown number), special classes (the number is negligible), and favors granted to parents by a former principal. (PX 264, at 586). At one time, the Board did attempt to shut down the antiquated School 34 and consolidate the schools, but area residents protested and the Board demurred. (PX 264, at 586). It is, of course, no constitutional violation for the Board to ignore its own sound economic or educational determination and continue to operate a rundown facility. But the Board cannot maintain a segregated facility in order to placate the local community. Spangler v. Pasadena City Board of Education, 311 F.Supp.501, 523 (C.D. Calif. 1970).

Defendants attempt to rebut the transfer evidence presented by the plaintiffs by showing that the transfer policies predate problems of racial imbalance and were instituted without any racial motives, and that in any case any segregative effects from the transfers granted were not substantial. The defendants' contentions completely miss the mark. There is no allegation that the transfer policies per se are denying plaintiffs their rights. Any organization must have flexibility, and a school system of 90 schools and over 60,000 students must, of course, allow for special circumstances. Valid transfers are not attacked. What is attacked is the knowing granting of transfers, for specious or blatantly discriminatory reasons, that increases the segregation that characterizes many schools in Buffalo. The defendants cannot deny what their own records show and what their own Director of Student Personnel admits - transfers were granted white students to avoid attending predominantly black schools.

The transfer policy not only increased segregation, which when isolated as separate transfers might appear insubstantial, but it also increased the proliferating tendency on the part of both school administrators and the public at large to identify certain schools as black. It is one thing to argue that unauthorized and surreptitious transfers, granted by certain principals, cannot be said to have substantially harmed the plaintiffs. It is quite a different matter when the individuals officially responsible for such matters authorize such transfers. Like a clever photographer who uses an airbrush to eliminate what he does not want in a picture, the defendants try to haze over what the evidence clearly shows. But we are not dealing with art here, and the Constitution does not permit this court to avoid the evidence, however unsightly.

The combined effect of official and unofficial transfers, including the language transfers detailed in the court's discussion of East High School, supra, was an annual total of 2,000-4,000 white students attending schools outside the zone in which they live,

> thereby contributing to the higher percentage of black students in various schools, including Schools 54, 16, Fillmore Middle, Genesee-Humboldt [Junior High], Woodlawn [Junior], East High School, all of which have black student populations of at least sixty percent. (S-60).

2. OPTIONAL AREAS

The stipulated materials show that optional areas, which allow students to attend a school outside of their normal attendance zone, existed in the following school districts:

1. An area involving Schools 56, 30, 16 and 17. Schools 56 and 30 are heavily white, while Schools 16 and 17 are predominantly black. The optional area, located in School 17's district, allowed students living in that area to avoid School 17 in favor of one of the other three schools. [S-35(a)].

2. An area involving Schools 54, 74 and 17. School 54 was a majority white school until recent years. This optional area, also located

in School 17's district, allowed students to avoid 17 by attending 54 or 74. [S-35(a)].

3. An area involving Schools 31 and 40. Students in the overwhelmingly white optional area, located in School 31's district, could attend 40, a white school, in favor of School 31, a predominantly black school. This option ended in 1965 when the area was put in the School 57 district. School 57 at that time was a predominantly white school. [S-35(b)].

4. An area involving Schools 40 and 75. Students in this area, in the School 40 zone, could attend either 40, majority white, or 75, almost totally black. [S-35(c)].

5. A portion of the Woodlawn Junior High School district, comprising the area bounded by Delaware Avenue, Main, West Ferry and West Delavan Streets, was made optional in 1964 when the school was originally districted. Students residing in that predominantly white area could attend either School 56 (which feeds into Lafayette High School) or Schools 16 or 17 (which feed into Woodlawn Junior High School). [S-35(d); S-27(b)(3)].

6. All district boundary streets were optional zones, allowing residents of those streets the options of attending either of the contiguous district schools. [S-35(f)].

It is not denied that these optional zones enabled some white students living in these zones to avoid the schools they would normally attend in favor of predominantly white schools. (S-38). Nor is it denied that the City defendants were fully cognizant of the detrimental racial result of these options long before this policy was abrogated. (S-36, 40; see PX 10, at 23-27). The parties have agreed that

> [m]aintenance of the optional areas has contributed to racial separation and isolation in the Buffalo public school system.
> (S-41).

Any student, whether black or white, who resided in an optional district could take advantage of the option. The evidence showed, however, that the populations of the optional areas were usually predominantly white. (Record, Vol. III, at 70).

A vivid example of the egregious segregative effect these optional areas could produce is School 17. This school is located just west of Main Street, with its district lines encompassing an area to the east and to the west of Main. In 1962, according to the United States Civil Rights Commission Report, the eastern section of School 17's attendance zone was approximately 80% black, the segment on the west about 95% white, yet even at that time School 17's enrollment was 98% black. (PX 10, at 14). The optional area, consisting of the western, or white, portion of 17's district, provided a convenient alternative for white students. School 17 remains nearly all black today. See Table 3 , supra.

Did the School Board intend this segregative result? We must conclude that it did. If the Board was not fully aware of the problems caused by optional areas, and School 17's optional in particular, before the anomalous racial balance of School 17 was cited in the United States Civil Rights Commission Report in 1963 (PX 10, at 14), it was certainly aware of it after the Report was published. The report noted that "the continued existence of the option [area] was thought to be an example of the school authorities' unwillingness to recognize the segregative effect of their policies." (Id., at 14). Most of these optional areas remained in existence for another decade, and each year students living in an optional zone were allowed to exercise their option with harmful results to the racial balance of the schools involved. The segregative results of the optional areas policy were, under the *Hart* test, clearly foreseeable. *Hart*, *supra*, 512 F.2d, at 50.

The defendants' witness, Mr. Leonard Testa, an employee of the Board of Education, testified that high school optional districts were designed to make the system more flexible in the face of population shifts, but these high school optionals were abolished in 1957. (Record, Vol. VII, at 101-102). No rational reason for the remaining optional areas, involving grammar schools and Woodlawn Junior High, was advanced by the defendants.[37] The 1963 Civil Rights Commission Report ascribed their origin to "tradition." With regard to the failure of the Board to end the optionals, the report noted:

> Tradition and inertia are powerful forces in our society. They seem a weak excuse, however, for inaction.
> (PX 10, at 27).

In 1973, after the detrimental effect of the optional zones was again called to the Board's attention, this time by HEW, they were abolished. (S-34; Record, Vol. III, at

43-44).

That the defendants abolished the optional districts, after HEW notified Superintendent Manch that their maintenance would be considered a violation, does not remove the matter from this lawsuit. The segregative results that these optional areas helped to cause remain today. Therefore, the Board actions with respect to this policy remain probative of the Board's segregative intent vel non. Keyes, supra, 413 U.S., at 210-211. In addition, it appears that the optional area in the western portion of Woodlawn Junior High School's district remains today. This optional area, instituted in 1964 when the Board was fully aware of the detrimental racial effect such optionals could produce, effectively destroyed any chance that Woodlawn Junior High would have a substantial number of white students. See section IV-B of this opinion, supra.

The court concludes that the Board's transfer and optional areas policies were substantial contributing factors to the segregation at all levels of the BPSS, and that this segregative effect was clearly foreseeable by the Board.[38/] The Board nevertheless deliberately continued to allow new transfers and optional movements every year until 1972, resulting in continued and increased segregation.

IV-D. VOCATIONAL-TECHNICAL HIGH SCHOOLS

The six vocational-technical high schools of the BPSS have no set attendance areas. Unlike all the other schools in the system, the general rule is that any child can attend any of these schools, depending only on the space available and the individual student's ability to meet the scholastic qualifications.[39] Contrary to the situation in many school systems, these schools are considered of high quality. (S-95). Plaintiffs allege that the Board discriminated against minority applicants to several vocational and technical high schools through a selective admissions process which had the effect of screening out minority students.

Prior to 1972, admissions criteria consisted of elementary school grades, a personal interview, and sometimes an additional test. At Hutchinson-Central Technical High School [Hutch Tech], an additional entrance exam was always required. Mr. Gardner, the former Board president, testified that in 1971 he concluded that "the policies of admissions to vocational and technical schools were being operated, to the Board's knowledge, in a manner which was discriminatory against black applicants." (Record, Vol. II, at 105). Mr. Gardner cited statistics (Record, Vol. II, at 106-110) that seemed to show that it was much more difficult for blacks to be admitted to McKinley, Seneca and Hutch Tech (which, in 1971, were 83.0, 82.5 and 85.1% majority, respectively) than Burgard, Emerson or Fosdick-Masten High Schools (then 41.7, 45.2 and 94% minority, respectively). (PX 7, at 21). The result was that "regardless of what the [Board's official] policy was, the system was, for some reason, operating as to make it more difficult for a black with a comparable record to be admitted to certain schools than for a white." (Record, Vol. II, at 112). Mr. Gardner's testimony was corroborated by the HEW survey of the BPSS. (Record, Vol. III, at 50-54).

In June of 1971, a committee was formed by the Board to investigate the admissions procedure for the vocational and technical schools. (PX 67). In February of 1972, on a recommendation of this committee, the procedures were revised so that admissions interviews and entrance tests would no longer be used at the vocational and technical high schools, except at Hutch Tech, where a revised entrance test would be used. (PX 74). The committee's report noted that

> [e]ffort will be made to increase minority group representation in vocational and technical high schools on a fair and equitable basis to insure all students the right to an education based on needs and ability. (PX 74, at 3).

As the parties agreed in the stipulation, "[s]uch changes [in admissions procedures] have not significantly improved the racial isolation in the Buffalo vocational schools" [S-98(b)], and therefore the Board's revision of the discriminatory admissions procedures does not eliminate this area from our consideration. As we have pointed out before,

> If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."
> _Keyes_, _supra_, 413 U.S., at 210-211.

The Board does not deny that admissions for minority students at McKinley, Seneca and Hutch Tech were discriminatorily restricted, although it argues that the numbers involved are insignificant. (Post-trial Brief for City

Defendants, at 26).

Table 12, infra, shows that the numbers here are not insignificant. McKinley, Seneca and Hutch Tech are all in the 80% majority range, while Burgard and Emerson are approximately 46% and 44% minority. Fosdick is 98% minority. Given the substantial difference in enrollments of minorities at the two groups of schools, and given defendant Board's admission of discriminatory admissions policies at the predominantly white schools, it is not enough for the Board to say that this is a de minimis situation. In the Supreme Court's words, the Board has not shown that "a lesser degree of segregated schooling in the [vocational schools] would not have resulted even if the Board had not acted as it did." Keyes, supra, 413 U.S., at 211.

Fosdick-Masten Vocational School is the only all-female vocational high school in the BPSS.[40] Described by one witness as a "step-child" of the Board (Record, Vol. II, at 127), it has become increasingly more segregated since 1960. (PX 264, at 691; PX 6, at 23). As long ago as 1968, the Board planned to replace it (PX 164), and from 1970-1974, the Board allowed the school to linger on administrative death-row under the condemnation of urban renewal. (Record, Vol. II, at 127). Fosdick-Masten was given a sudden reprieve when plans for the new East Side High School, which was to have absorbed the programs at Fosdick, were eliminated in the City's 1974-75 budget. See section IV-F(4)(b) of this opinion, infra.

The attendance figures for September 1973 and 1974, and the estimated capacities for each of the vocational-technical schools are presented in Table 12:

TABLE 12

VOCATIONAL HIGH SCHOOLS CAPACITIES AND ENROLLMENTS

SCHOOL	1974 CAPACITY ESTIMATE	1973 SEPT. ENROLLMENT	1973 MINORITY %	1974 SEPT. ENROLLMENT
Burgard	1107	1087	45.8%	1070
Emerson	640	554	44%	625
Fosdick Masten	840	595	98.1%	626
Hutch Tech	1200	1157	19.8%	1172
McKinley	1160	1176	20.3%	1132
Seneca	1160	1166	20.0%	1157

SOURCE: DX 21; PX 6, at 23. (1974 Minority % not in evidence).

The Board attempts to absolve itself from any involvement in Fosdick's 98% minority enrollment by reiterating that the vocational-technical schools do not have any restricted attendance zone and that attendance at the schools depends on the choice of the individual student. But the Board does not act in a vacuum, and the actions it takes with respect to admissions at one vocational school will necessarily be felt at another. All the vocational-technical schools are close to full enrollment _except_ Fosdick-Masten. See Table 12, _supra_. If admissions at Hutch Tech, McKinley and Seneca were non-discriminatory, and the number of blacks at these schools increased, the enrollments at the other vocational schools would necessarily be affected.

The court intimates no opinion on whether or not the revised policy on admissions implemented in 1972 (PX 74) is a sufficient answer to the segregative actions that occurred prior to 1972. All the court states is that, on the evidence before it, the discriminatory actions of the Board with regard to admissions at vocational-technical high schools had caused segregated conditions to exist at a significant number of those schools, and that, at the time this case was tried, these conditions continued to exist.

IV-E. STAFF

As of 1970, the population of the City of Buffalo was 21% non-white. The numbers and percentages of non-white staff members of the BPSS, for the years 1967 to 1973, are presented in the following table.

TABLE 13

BPSS MINORITY STAFF

	1967-68	1968-69	1969-70
Principal	1 (1.2%)	1 (1.2%)	3 (3.6%)
Ass't.Principal	6 (6.8%)	6 (6.3%)	6 (6.4%)
Other Staff*	357 (10.0%)	367 (10.6%)	374 (11.1%)

	1970-71	1971-72	1972-73
Principal	5 (6.0%)	6 (7.2%)	13 (15.1%)
Ass't.Principal	7 (7.6%)	7 (7.9%)	4 (4.8%)
Other Staff	352 (10.0%)	369 (10.2%)	413 (11.4%)

*"Other Staff" includes teachers, counselors, librarians, etc.

SOURCE: PX 13.

The plaintiffs allege that the assignment of these under-represented black teachers and principals generally to predominantly black schools, and the failure to recruit significant numbers of new minority teachers are further segregative acts and refusals to act by the Board of Education.

1. STAFF ASSIGNMENTS

The information in the following paragraphs, taken from the stipulations (S-20), indicates the extent of staff segregation in 1970 and 1973 in the BPSS.

In 1970, fifteen elementary schools in the 85-100 percent majority range had no black teachers, while 63.3 percent of the black elementary teachers were concentrated in fifteen predominantly black schools. In 1973, nine elementary schools that were 85-100 percent white were without a single black teacher, and 57.6 percent of the non-white elementary teachers were assigned to fourteen predominantly black schools. The special elementary schools exhibited similar figures. In 1970, 41.6 percent of the faculty at the three predominantly minority special schools were non-white, while at the other three special schools only 5.6 percent of the teachers were non-white. In 1973, 28 percent of the teachers at the predominantly black special schools were minority; the average percentage of non-white teachers at the other four special schools was 3.1 percent.

The middle and junior high schools' staffing was similar. In 1970, Woodlawn Junior and Clinton Junior Highs, virtually 100 percent black, had minority teacher percentages of 25.9 and 10.9 percent respectively, while the predominantly white middle and junior highs had very few non-white staff. In 1973, the non-white faculty percentage at the two nearly all black schools averaged 28.7 percent; the comparable percentage at the other four schools was 8 percent.

In the academic high schools, 39 percent of all minority academic high school teachers in 1970 were assigned to East High, where they comprised 21.4 percent of the East faculty. The non-white teachers at the remaining six academic high schools ranged in representation from 3.7 to 12.9 percent of the individual school's staff. Three years later, 47.2 percent of the minority academic high school teachers in the BPSS were assigned to East. The East High minority teacher percentage was 32 percent, while the corresponding figures at the other six academic highs were between 2.1 and 9.7 percent.

The same situation existed in the vocational-technical high schools, where in 1970 the nearly all black Fosdick-Masten High had a non-white teacher percentage of 16.7 percent. Of the other five vocational-technical highs, none had a faculty of more than 2.5 percent minority. In 1973, the Fosdick-Masten faculty was 23 percent minority, while the remaining five vocational high school faculties ranged from 1.6 to 6 percent minority.

This concentration of black staff in predominantly black schools dates back at least to 1960. (PX 264, at 690-707). The evidence at trial also showed that black administrators were disproportionately over-represented at black schools. In 1970, each of the four minority principals and each of the seven minority assistant principals were assigned to schools over 98% black. (PX 264, at 718). In 1973, there were fourteen non-white principals; thirteen headed predominantly non-white schools. [S-20(d)(ii)].

The importance of the staff issue is accentuated in this particular case because of its unique position vis-a-vis the other charges brought by the plaintiffs. The defendants cannot argue, as they have with respect to student segregation in the schools, that the fortuitous combination of residential segregation and a racially neutral neighborhood school policy combined to segregate the teaching staff of the BPSS.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Supreme Court noted that

> existing policy and practice with regard to faculty [and] staff . . . [are] among the most important indicia of a segregated system. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.
> 402 U.S. at 18. (Citation omitted).

Essentially the Board does not deny what the statistics detailed *supra* indicate -- significant numbers of teachers and administrative personnel are assigned to schools under two racial criteria, the race of the teachers or the administrative personnel, and the racial makeup of the student population at the schools. Mr. Eugene Reville, Mr. Manch's successor as Superintendent of the Buffalo Public Schools, who was Associate Superintendent for Instructional Services at the time of the trial, testified that reassignments had been made to achieve a better racial balance in the school staffs. (Record, Vol. VII, at 192-93). Some of this ameliorative effort was admittedly done under the coercion of a threatened fund cutoff from the Department of HEW. (Record, Vol. VII, at 164-167). HEW had singled out three elementary schools with heavy black teacher concentrations, and nine elementary schools with no black teachers, and demanded that this situation be remedied. The Board's response was to lower the percentages of minority teachers at the three predominantly black schools and to assign black teachers to three of the nine previously all white staffs. Mr. Reville testified:

> I think very soon we will get a fourth [black teacher] into the nine schools

> and this certainly isn't integrating the staffs, but we are moving in that direction.
> (Record, Vol. VII, at 166-167).
> (Emphasis added).

Although it has acted under pressure from HEW to improve the staff racial balance, it is the contention of Superintendent Reville that the policy of teacher assignments based on racial criteria has a sound educational rationale. As Mr. Reville explained it, given the racial imbalances characterizing the BPSS, it is his belief that black teachers and administrators should be assigned to the predominantly black schools because of the need of black students for role models and because the black teachers and administrators have greater understanding of the black community.[41/]

It is thus plainly admitted that the Board has purposely followed a policy that has segregated, and was intended to segregate, the teacher and administrative staffs in the Buffalo public schools. Whether the Board's excuse for this action, to provide black role models for black students, is the real motivation behind the staffing according to race, is legally irrelevant. Whether desired by the majority or the minority, whether the motive be evil or benign, racial segregation in the public schools cannot withstand the proscriptions of the fourteenth amendment. Cooper v. Aaron, 358 U.S. 1 (1958); Morgan v. Hennigan, 379 F.Supp. 410, 461 (D.Mass. 1974), aff'd sub nom. Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975).

Defendant Board of Education's theory, if carried to its logical conclusion, supports the complete separation of the races in public schools. One of the premises of Brown, and the many cases that have followed, is simply that segregation is harmful for both black and white children, and ultimately divisive and destructive for society. It is not contended by this court that minority role models are not important for minority students. Racial and ethnic pride has its value. But, in the constitutional scheme, a higher value in the hierarchy is integration. Integration, and the understanding it fosters, will provide both black and white role models for both black and white children. See United States v. School District of Omaha, 521 F.2d 530, 537-38 (8th Cir. 1975), cert. denied, ___ U.S. ____, 44 U.S.L.W. 3280 (U.S.

Nov. 11, 1975), in which the court, faced with the same role model rationale, stated inter alia that

> such a belief--if truly held--reinforces rather than undercuts the presumption of segregative intent with respect to students, since it would logically suggest herding black students into their own schools where they could be taught by their proper black role models. The defendants are thus hoist by their own petard.
> 521 F.2d at 538-39, n.14.

2. STAFF RECRUITING

As we have already pointed out, the Buffalo population, according to the 1970 census, was about 21% non-white, while the public school population in Buffalo in October 1973 was approximately 47% non-white. (S-9, 10).

The non-white teacher population, as indicated by Table 13, supra, was only 11.4% in 1972-73 and had not increased significantly since 1967-68. In fact, the evidence showed that the minority teacher percentage stood at 11% in 1965 (Record, Vol. III, at 29-30), and was estimated to be at just under 10% in 1962. (PX 10, at 19). Plaintiffs charge that these statistics are proof that the Board's recruitment practices discriminate against minority groups. At trial, they cited the failure, until 1974, to give teacher exams at recruitment locations, failure to advertise in a direct and intensified manner for minority applicants, and failure to make use of civil rights organizations as contacts or liaisons with the potential minority applicants. [S-22(e)]. Mr. Gilbert Francis, who conducted the HEW review of the BPSS, testified for the plaintiffs that the efforts of the BPSS to enlist added minority teachers "[i]n many school districts . . . would be considered as properly inadequate." (Record, Vol. III, at 33-34).

The Board, through Mr. James Connors, Associate Superintendent for Personnel for the BPSS, detailed its attempts to hire additional minority teachers. He explained that college campuses throughout the eastern half of the United States were visited and that "[o]ne of the main aims, particularly in the last five years, was to contact colleges and universities where there was a large black enrollment, to try to attract minority teachers to the Buffalo School System." (Record, Vol. IX, at 47-48). Notwithstanding these efforts, he said, 95% of Buffalo's public school teachers were hired from Western New York campuses. (Id., at 48). Mr. Connors stated that there were several obstacles his program stumbled against, including the tendency of recent graduates to teach in the area they attended school, competition with government, private industry and other school systems for minority applicants, and New York Education Law, §2573 (McKinney's 1970), which requires only Buffalo and New York City to give a licensing exam for teachers. (Record, Vol. IX, at 50-56). This test requirement of §2573 is additional to state certification, which is the sole requisite in all other school districts in New York State. (Id., at 54-55).[42/]

The recruitment efforts of the Board for the four schools years 1967-70 are laid out in the HEW compliance review (PX 264, at 679-685). The report reads in part:

> The charts [of recruitment data] reveal that there has been no significant increase in hiring of minority group teachers through the increased recruitment efforts of the school district. Visits to the predominantly black colleges have not produced any more black teachers than had been coming from those colleges in the years before the recruitment visits began. (Id., at 684).

Mr. Connors' testimony indicated that the same analysis could be made for the years 1970-74.

Some courts have held that such figures, as shown in Table 13, supra, themselves may constitute prima facie evidence of intentional segregation. See Crockett v. Green, 388 F.Supp. 912, 917 (E.D.Wis. 1975), where the court stated:

> A substantial disparity between the proportion of minorities in the general population and the proportion in a specific job classification is sufficient to establish a prima facie case of discrimination.

See also United States v. Lathers International Local 46, 471 F.2d 408, 414 n. 11 (2d Cir. 1973), cert. denied, 412 U.S. 939 (1973). Though the Board did detail its efforts to improve minority staff hiring, the results were admittedly dismal. When compared to the moderate improvement in the minority percentage of principals and assistant principals from 1967 to 1973, the static underrepresentation of minority teachers is evidence of the Board's unwillingness to effect a similar change in the BPSS's teaching staff.

As Chief Judge Brown of the Fifth Circuit has stated, "figures speak and when they do, Courts listen . . . ."

Brooks v. Beto, 366 F.2d 1, 9 (5th Cir. 1966), cert. denied, 386 U.S. 975 (1967). The Supreme Court has also indicated the persuasiveness of statistics. In Hernandez v. Texas, 347 U.S. 475 (1954), the petitioner charged that citizens of Mexican descent were systematically excluded from the jury roles. The Court stated that

> [c]ircumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner.
> Hernandez v. Texas, supra, 347 U.S., at 482.

We feel constrained to say that this court's credulity is also taxed by the failure f the Board to increase the minority teacher percentage, in any meaningful amount, in over ten years' time.

IV-F. THE STATE INTEGRATION MANDATE

The Board of Education[43] of the City of Buffalo has direct control over the BPSS, but its powers are limited in several fundamental respects. It is subject to State control by the Board of Regents and the State Commissioner of Education on matters of education and educational policy, as discussed *infra*. It is also totally dependent on the City Council and the State for its financial requirements.[44] Any capital improvement or other financially significant program conceived by the Board is destined to be stillborn if the Common Council denies the necessary funding.

The Board of Education's actions with respect to the siting and districting of Woodlawn Junior High School, the language transfer program at East High School, its general transfer and optional areas policies, its admissions procedures for vocational-technical schools, and its minority staffing and recruitment measures have already been discussed. A thorough study of Board action since the 1950's convinces this court that the already proven allegations of segregative actions and omissions are unfortunately not isolated incidents. The Board's course of action for the last two decades, and more specifically since 1965, has been consistently dilatory, evasive and at times obstructionist. Though there are some clear instances of positive Board action to integrate the BPSS, these actions were consistently taken under pressure and were inevitably designed to see the Board through the immediate crisis and to stall more extensive and effective efforts.

The actions of the City Council were very similar. Whenever the Board of Education was forced to implement integration plans, even if quite modest, the City Council quickly shut off the money supply or enacted an ordinance that would effectively negate the Board's actions. And, like the Board, if the City Council were forced to act, it would always find the route of least possible integrative consequence, hoping to stall until another day any meaningful integration.

But however much the Board of Education or the City Council procrastinated or wavered, an equal share of the blame for the segregation in the BPSS must be attributed to the State defendants. The Board of Regents and the Commissioner of Education have the central responsibility for education in New York State. They have the tools necessary to effectuate the integration policy they devised and to enforce the law they were clearly aware of. The State defendants shirked their responsibility under the laws of New York State and the Constitution, and in so doing encouraged the City defendants to continue their own segregative actions. They, like the City defendants, must be held accountable.

1. NEW YORK STATE EDUCATION LAW

In New York State, full power over education is constitutionally vested in the State[45] and specifically in the Department of Education, which "is charged with the general management and supervision of all public schools and all of the educational work of the state." New York Education Law, §101 (McKinney's 1969). The governing body of the University of the State of New York, the corporation formed in 1784 to charter and control schools in the State, is the defendant Board of Regents. New York Education Law, §§201, 202 (McKinney's 1969; Supp.

1976). The Board of Regents is the statutory head of the Department of Education, and the Commissioner of Education, who serves at the pleasure of the Board of Regents, is the chief administrative officer of the department. New York Education Law, §§101, 303 (McKinney's 1969). The powers granted to the Commissioner under New York State statutes are extensive. In addition to the "power and . . . duty" to enforce statutes "pertaining to the school system of the state or any part thereof or to any school district or city," and "the power and authority to likewise enforce any rule or direction of the regents" [New York Education Law §308 (McKinney's 1969)], the Commissioner is also granted judicial authority to hear and decide appeals from persons believing themselves aggrieved by actions of any school officials. In such appeals, the Commissioner's decision "shall be final and conclusive, and not subject to question or review in any place or court whatever." New York Education Law, §310 (McKinney's 1969).[46]

As broad as these specific grants of authority are, the law provides for expansion of the Commissioner's legal clout:

> The regents may adopt rules conferring and imposing upon the commissioner of education such additional powers and duties as may be required for the effective administration of the department and of the state system of education.
> New York Education Law, §301 (McKinney's 1969).

2. THE REGENTS' INTEGRATION POLICY

The actions of both the State Regents and the Commissioner of Education over the past two decades, and particularly since 1965, weave a saga of much talk and insufficient action, at least as far as the BPSS is concerned. As early as 1960, the Regents issued a policy statement urging the desegregation of New York State's public schools. (PX 28, Pt. II, at 11-12). Commissioner Allen, in 1963, stated:

> A special responsibility rests upon educators in this period. Not only must we act firmly and with all possible speed to eliminate segregation, de jure or de facto, but we must also give renewed emphasis to the teaching of the principles of equal rights and freedom that motivates our actions.
> (Id., at 10-11).

In 1969, a report prepared at the request of the Board of Regents and the Commissioner of Education entitled "Racial and Social Class Isolation in the Schools" exuberantly claimed that "[s]ince 1900, the political and educational leadership in New York State had reacted positively in attempting to eliminate the inequalities resulting from de facto segregation." (Id., at 7). Unfortunately action, in some instances, has not matched rhetoric.

In 1963, the Commissioner requested all school boards to notify the State Education Department of those schools in their systems having a black enrollment exceeding 50%.[47/] (PX 304, at 2). Guidelines for desegregation were drawn up, with primary emphasis on local control and local action to effect desegregation. (PX 304). Included in the guidelines were the following statements:

> 4. . . . In establishing school attendance areas one of the objectives should be to create in each school, a student body that will represent as nearly as possible a cross-section of the population of the entire school district, but with due consideration also for other important

> educational criteria including such practical matters as the distance children must travel from home to school.
>
> 5. A "neighborhood school" offers important educational values which should not be overlooked. . . .
>
> 6. When a "neighborhood school" becomes improperly exclusive in fact or in spirit, when it is viewed as being reserved for certain community groups, or when its effect is to create or continue a ghetto type situation it does not serve the purposes of democratic education.
>
> (PX 304, Guiding Principles for Dealing with De Facto Segregation in Public Schools).

Almost immediately, the Regents and the Commissioner of Education were put to the test in Buffalo. In the words of the Chairman of the State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, "[g]reat problems of life require endless difficult reappraisals." (PX 305, at v). Unfortunately, the Commissioner of Education and the Regents at times stressed the "endless" and failed to reach the "difficult reappraisals."

3. THE YERBY DIXON APPEAL

After the districting of Woodlawn Junior High School in 1964, several Buffalo parents, on behalf of their school children, took an appeal to the Commissioner of Education charging that the BPSS was racially imbalanced, that the Board of Education refused to alleviate the imbalance, and that blacks were discriminated against in the recruitment and distribution of teachers. On February 15, 1965, the Commissioner held for the plaintiffs on their first two allegations and stated:

> I hold that in developing its pupil assignment policies and in planning for new school buildings, it is incumbent upon a board of education to take into account the continued existence or potential creation of a school populated entirely, or largely, by Negro pupils.
> Yerby Dixon Appeal, 4 Ed.Dept.Rep.115, 117 (1965).

The Commissioner retained jurisdiction over the appeal, "pending the adoption by the Buffalo Board of Education of a plan for mitigating the problem of racial imbalance which meets with my approval." 4 Ed.Dept.Rep., at 118. The Board did not appeal the Commissioner's ruling.

At the time of Commissioner Nyquist's testimony in this lawsuit, ten and one-half years after Commissioner Allen's decision in the Yerby Dixon Appeal, the Commissioner still retained jurisdiction over the appeal, and still was not satisfied with the actions of the Buffalo Board of Education. Put more bluntly, in the words of the parties to this lawsuit,

> The Commissioner is aware that the Buffalo Board has done virtually nothing to enforce the order of February 15, 1965 through June 30, 1974, when an elected board took office. The Commissioner has no evidence that the newly-elected Board has complied or is planning to comply with the order.
> (S-137).

This court does not quarrel with the initial decision to defer to local authorities to solve what is admittedly a complex and demanding situation. Chief Justice Burger has suggested that "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." Milliken v. Bradley, 418 U.S. 717, 741-42 (1974). Both the Commissioner and the Regents acknowledge this concept. (PX 304, at 2). But, when effective local action is not forthcoming, and no reasonable person[48] could expect that it will be forthcoming, and repeated attempts at cajoling, pleading and coercing the local authorities into action have failed, there comes a time when those individuals with both the power and responsibility to act must assert themselves. Deference to local authorities is not an absolute and binding requirement. It is a policy decision with a defined and limited rationale, *i.e.*, that the local authorities have a greater degree of knowledge and insight into the complexities of local concerns. However, when the local authorities refuse to accept the responsibility that is theirs, State authorities have no recourse but to act. Neither the Commissioner nor the Regents did so in the case of the Buffalo public schools. A brief review of the decade following the *Yerby Dixon Appeal* delineates the culpability of the Regents and the Commissioner of Education, as well as that of the Common Council and the Board of Education.

4. THE DEFENDANTS' RESPONSES TO THE YERBY DIXON ORDER

a. The Board of Education's Integration Plans: 1965-1969. Commissioner Allen ordered the Board of Education to

> prepare, approve and submit to me on or before May 1, 1965 a plan for the progressive elimination of racial imbalance, including the steps to be taken in this direction beginning with the school year 1965-66.
> Yerby Dixon Appeal, supra, 4 Ed.Dept. Rep. at 118-119.

The plan submitted by the Board did not meet with the Commissioner's approval. He stated at the time that "[i]t fails to come to grips realistically with the problem or to present a long-range solution or to identify the barriers which must be overcome in order to reach a solution." (PX 278, at 4).

A citizens' committee was appointed by Commissioner Allen to assist him on the desegregation problems, and the Buffalo Board asked the State Education Department to lend its help. The advisory committee in August of 1966 submitted to the Board of Education a proposal drafted by the New York City Center for Urban Education, which included the use of a middle school concept to aid the desegregation effort. In September 1966, Commissioner Allen ordered the Buffalo Board to again submit a further plan for desegregating the BPSS. A 16-point proposal was approved by the Board and sent to the Commissioner in November 1966.

This plan provided for assignment to peripheral schools of as many 6th to 8th grade inner-city pupils as could be accommodated, and for the establishment of a "Coordinator of Integration" to facilitate "quality integrated education." (PX 278, at 6-7). In April of 1967, the Board sent to the Commissioner its proposals for effective implementation of the previous November's plan. It recommended the establishment of Fillmore Junior High as a demonstration middle school, and proposed that new middle schools be limited to one-third black membership. It also proposed that all middle schools be located in predominantly white areas of the city. The Board specifically stated that white students would not be transported to non-white neighborhoods.

This plan also failed to meet the Commissioner's expectations and approval. He labeled it "disappointing and unsatisfactory, lacking specificity and devoid of any real evidence of a serious intent on the part of the Board to significantly reduce racial imbalance in the Buffalo School system." [S-101(b); PX 278, at 8]. The Board was again ordered to submit a detailed plan. In late January 1968, three years after the original demand from the Commissioner, the Board produced a new plan, "Recommendations for Achieving Quality Integrated Education in the Buffalo Public Schools." (PX 278, at 8). This new proposal detailed the results of the desegregation efforts since 1965. As of January 1968, the School Board reported, 1200 inner-city pupils were being bussed to peripheral schools, and the projected increase in this number for September 1968 was an additional 250. Also, 130 children from predominantly black schools were assigned to South Park High School and another 130 from nearly all black School 31 were attending Southside Junior High School.

The central feature of the Board's new plan was to restructure all the public schools on a 6-4-4 basis as follows: (1) Pre-kindergarten to fourth grade would be located in neighborhood schools and would service a sufficiently small area that walking to school would be possible; (2) Fifth to eighth grades would be in a series of middle schools, some new, some converted junior highs. These middle schools would be situated in peripheral neighborhoods and be distributed so that their racial composition would reflect that of the district as a whole, and so that two-thirds of the pupils would live in the immediate area; (3) The ninth to twelfth grades would be in the regular high schools, thus requiring that ninth grades from junior highs be absorbed in the high schools. (PX 278, at 9-12). This middle school plan, often referred to as the 4-4-4 plan, would have effectively integrated the fifth through twelfth grades, but would have left grades one through four in their existing segregated state. [S-120(b)].

The plan made the following specific proposals: converting Genesee-Humboldt Junior High and Southside Junior High into middle schools, developing initiatives to integrate Woodlawn Junior High School, 49/ and either integrating East High School proper or distributing its students to other high schools. (S-102). The Board also endorsed the "educational park" 50/ concept to promote economic and educational efficiency, and to facilitate future metropolitan integration as population shifts occur. A $40,000 planning appropriation for a metropolitan educational park was recommended. (PX 278, at 14-15).

The Commissioner ordered that the Board report to him by November 15, 1968 on the actions taken to activate the proposals of this plan. In its November 1968 report, the Board detailed its efforts to date to the Commissioner (PX 271), noting that at that time, three and a half years after the Commissioner's original order to desegregate the BPSS, some 2,000 inner-city children were being transported to so-called "receiving" schools. The Board also reported the difficulty it was having with two phases of its desegregation program: its proposal for the use of portable classrooms and appropriations for middle school planning. The Board's difficulty was due in large part to Common Council opposition.

b. Common Council Opposition. To increase the capacity of the designated receiving schools on the inner-city periphery, the Board had agreed in May of 1968 to purchase 24 portable classrooms. They were to be placed at twelve of the predominantly white receiving schools [S-112(a)], and would accommodate 450 minority youths from

Clinton and Woodlawn Junior Highs.[51/] Within six days of the Board's decision, the Common Council requested the Corporation Counsel to draw up whatever legislation would be necessary to outlaw such portable classrooms. [S-113(a)]. Against the express advice of the Corporation Counsel, who warned that the proposed ordinance was "discriminatory in purpose, nature, and object," [S-116(b)], the Common Council enacted an ordinance that required any addition to a school to be constructed with the same material as the permanent school building.[52/] (S-114). The ordinance, which effectively prohibited the portable classrooms, was vetoed by the Mayor (S-116), but the veto was subsequently overridden by the Common Council. (S-117). The Board of Education then took the City and the Common Council to court, and succeeded in having the ordinance declared unconstitutional. Board of Education v. Buffalo, 57 Misc.2d 472, 293 N.Y.S.2d 421, aff'd 302 N.Y.S.2d 71, 32 App.Div.2d 98 (4th Dept. 1969). The Common Council's action delayed the portable classroom plan at least one year. (S-119).

It is undisputed that the core feature of the Board's 1968 integration plan submitted to the Commissioner was the middle school program. [S-120(a)]. Had it been implemented, integration could have been achieved on a broad scale.[53] From the outset, however, the middle school concept faced stiff opposition from the Common Council and, at the time of trial, the comprehensive plan for a city-wide system of six middle schools lay dead, with only two schools to mark its demise.[54]

The Common Council's opposition to the middle schools plan was not long in forming. A new junior high school[55] in the Riverside area was under construction at the time the Board agreed in 1968 to restructure the schools into the 4-4-4 format. Bond issues had been approved by the Council to cover the initial financing of the new school, and construction in mid-1968 had passed the half-way point. [S-122(a)]. Consistent with the proposed district-wide middle school plan, the Board changed the nascent junior high into a middle school. But, when the bond issue for final funding was submitted in late July 1968, the Common Council turned it down. [S-122(a)].

This action provoked considerable community uproar[56] and prompted then Superintendent Manch to state: "The issue is integration just as it was on the portable classrooms." [S-122(c)]. Eventually the Common Council did approve the bond issue; the school was built and opened as the West Hertel Middle School. (S-123).

The City defendants argue that since the school was built, the Common Council's actions are not probative of segregative intent. This argument might hold some water if the Common Council's action in allowing the West Hertel school to be completed signified its intent not to obstruct the 4-4-4 plan. Unfortunately, the decision to fund the school was apparently a case of the Council's deciding to choose what it considered the better of two evils: abandoning a school that was more than one-half completed, or acquiescing in its completion as a middle school. In July of 1968 and in June of 1969, resolutions approving planning funds for the balance of the middle school program were turned down by the Common Council. (S-124, 125). The Common Council's opposition to the Board's integration efforts has been a substantial factor in the continued and increased segregation in the BPSS. There can be no doubt that its actions were intended to achieve that result.

The plaintiffs also charge that the Common Council's refusal to negotiate a lease or purchase of Bishop Ryan High School from the Buffalo Catholic Diocese was a segregative act. When Bishop Ryan was closed in 1971, the Board of Education drew up a proposal to use that school to relieve overcrowding at Southside Junior High and South Park High Schools. Under the Board's plan, ninth grade students at both schools would attend Bishop Ryan.

Since additional funding was required to obtain the school, the plan was submitted to the Common Council. The evidence at trial showed that during discussions with the Board, the Council requested assurances that the racial composition of the student body at the school be the same as when the diocese ran it, or at least not a greater percentage of black students than would have attended ninth grade at South Park High. Mr. Gardner, the ex-President of the Board of Education, testified that while this plan was being considered, residents of the Bishop Ryan area wrote to Board members expressing their opposition to the Board's use of the school. He described this opposition as racially motivated. On cross-examination, Mr. Gardner admitted that the Bishop Ryan building had once been owned by the BPSS, but had been abandoned for some reason, and that the stated purchase price of $1,000,000 was excessive in view of the condition of the building. (Record, Vol. II, at 168-69, 176).

The evidence is not sufficient to find that the Common Council's refusal to even negotiate with the Catholic Diocese was substantially motivated by segregative intent. However, the Council's insistence on limiting the number of blacks that would have attended the school, had it been purchased or leased, is further evidence of the Council's resistance to the Board's integration proposals.

Another plan of the Board's to alleviate crowding at South Park High was a new East Side High School, which was also designed to replace Fosdick-Masten High School, provide facilities for new programs and allow redistricting of East High to end that school's severe racial imbalance. The planning for this school consumed ten years, and Mr. Gardner testified that "[t]here is no site that has ever been selected for a school in Buffalo that was more carefully worked over." (Record, Vol. II, at 23-24). The proposed school site, on William Street on the City's east side, had already been purchased, and 4.6 million dollars borrowed, when the school was dropped from the City's 1974-1975 budget. Mr. Gardner testified that some citizens had expressed racial opposition to the project and that "the principal reason for the abandonment of this project was racial." (Record, Vol. II, at 35).

To contradict Mr. Gardner's testimony, the City defendants called Mr. James Burns, Commissioner for the Department of Administration and Finance, whose job it is to make budget recommendations to the Mayor. Mr. Burns testified that because of Buffalo's severe fiscal problems and because City planners projected that only 60% of the new school would be needed by the time it could be opened, he recommended that the East Side High School project be abandoned. (Record, Vol. VIII, at 116-119, 129). Mr.

Burns admitted that the City budget officials did not confer with Board members, but denied that the action was racially motivated. (Id., at 119, 128-130).

Although the court finds it surprising that the City's decision to suspend, perhaps permanently, the proposed East Side High School was made without any consultation with School Board officials, especially in light of a decade of planning, the evidence is not sufficient to prove that segregative intent was a substantial factor in this decision.

c. The Board of Education's Integration Plans: 1969 - 1972. Commissioner Nyquist,[57/] replying to the Board in June of 1969 about the Board's November 1968 proposals, cited statistics that showed that little actual integration had been effected. Mr. Nyquist stated: "Despite the progress described in the report [of November 1968], the conditions which prompted an appeal to the Commissioner of Education [i.e., the Yerby Dixon Appeal] by the parents of Negro children still exist." (PX 272, at 2). It was then more than four years after Commissioner Allen's Yerby Dixon decision; the Board's responses had failed repeatedly to satisfy the Commissioner; and the segregation in the schools that prompted the Yerby Dixon decision had not been substantially alleviated. Mr. Nyquist requested the Board to notify him within one month of its plans for that fall.

After the Board's next report, Commissioner Nyquist stated in a letter dated August 1, 1969 that "[i]t is apparent from the [Board's] report [of July 14] that there is forward movement in several respects," noting in particular the planned opening of integrated West Hertel Middle School, the use of portable classrooms located at peripheral schools for 300 inner-city students, the expected increase of inner-city transfers to peripheral schools from 2043 to 2600, and the possibility of suburban school district cooperation. (PX 276). This forward movement proved to be short-lived.

As one of its efforts to meet the Commissioner's demands, the Board had requested Superintendent Manch to initiate discussions with suburban school districts to enlist their assistance in the desegregation efforts. The evidence at trial indicated that only the Williamsville

Central School District reacted favorably to whatever overtures Superintendent Manch made. However, a plan to transfer a small number of inner-city students to Williamsville schools was quickly rejected by the residents of that suburb.

The Board apparently continued to file reports with the Commissioner's office, outlining the progress it claimed to have achieved,[58/] but over the next two years very little else was done by the Board or the State. Then, in January 1972, Commissioner Nyquist's interest was apparently renewed and he wrote the Buffalo Board:

> Review of the reports submitted to me shows that, while many worthwhile efforts have been made and successes achieved, the problem of racial imbalance in the Buffalo schools is still a long way from solution.

Commissioner Nyquist also stated:

> Faced with the hard fact that segregation is more severe in Buffalo now than it was seven years ago, with over 20 schools more than 90% black, and 29 schools 90% or more white, it is clear to me that only a new approach can equalize educational opportunity for the children of Buffalo. (PX 103, at 1,2). (Emphasis added.)

Commissioner Nyquist ordered the Board to devise a new plan that would integrate the early years as well as the 5 through 8 and 9 through 12 grades, although he did not completely rule out a 4-4-4 plan. The Commissioner gave the Board a little over two months to submit a desegregation plan "under which every school would substantially reflect the racial composition of the entire district." (PX 103, at 3).

Following seven years of weak leadership and continued acquiescence in the Board's dilatory actions, this stern and comprehensive order provoked, perhaps predictably, a strong and divisive reaction among Board members.[59/] Much of the Board's debate over the Commissioner's new order centered on the question of bussing. Ultimately, the Board approved by a 4 to 3 vote a motion to inform the Commissioner that the Board was unable to develop the requested April 1, 1972 desegregation plan. (PX 108). At the same Board meeting, the Board went on record as being opposed to any type of forced bussing and also voted to file its own staff's report, "A Study of Desegregation" (PX 111), called the Heck Report.[60/]

The Heck Report was the product of a year's work, and was produced in response to a Board request for a study on a cross-bussing program for Buffalo and the use of existing buildings for the middle school program. It proposed a restructuring of the BPSS into five large neighborhoods, each extending outward from the center of the City. The resultant racial balance at each school level was estimated to be from 30 to 45.9% black. The report stated that "[u]tilizing a variance of plus or minus 10%, it is feasible to assume racial balance for each [elementary] school at each level." (PX 106, at 29). The study recommended certain existing schools that would be converted to middle schools to achieve the Board's 4-4-4 plan, and integration in the 1-4 level was also provided for. The high school program was reported to need further study before detailed proposals to achieve full integration could be made. (PX 106, at 30).

After the Board had refused to develop the requested April 1972 desegregation plan, the Commissioner sent a State task force to Buffalo in May of 1972 to develop a State plan for integrating the BPSS. The State task force proposed two alternative plans, the first being the Heck Plan and the second being a modified version of the Heck Plan (PX 278,at 39-92), both of which were submitted to the Board in mid-November of 1972 with a request that the Board respond by January 3, 1973. These plans were also rejected by the Board, and, according to the Commissioner, this action by the Buffalo Board "more or less closed the door on any cooperative effort." (PX 298, at CW 7.5).

By January of 1973, some five years after the Board's 4-4-4 plan was adopted, only one middle school had been constructed, and only one other had been converted from a junior high. The Board's 1968 proposal had noted that "Fillmore Middle School is the initial step in a long-range program to place all children in grades 5-8 in integrated middle schools." (PX 271, at 10). Fillmore Middle was the initial step, being converted to a middle school in 1967, but, as of October 1972, it could hardly be called integrated, with a minority enrollment of 82.5%. (PX 7, at 19). West Hertel Middle

School, opened in 1969, was the second and last step in the Board's "long-range" 4-4-4 plan.

The following table shows that the junior high school system remained heavily segregated as of October 1973.

TABLE 14

MIDDLE AND JUNIOR HIGH RACIAL COMPOSITIONS OCTOBER 1973

Fillmore Middle -- 89% minority

West Hertel Middle -- 71.6% majority

Clinton Junior High -- 100% minority

Genesee Humboldt Junior High -- 90.9% minority

Southside Junior High -- 84.6% majority

Woodlawn Junior High -- 99.6% minority

SOURCE: PX 6, at 21.

The 1968 plan for integrating the public schools, the only plan even provisionally acceptable to the Commissioner of Education (PX 105, at 6), had been a nearly total failure:

1. Southside Junior High had not been converted to a middle school, and its racial imbalance in 1973, 84.6% majority, was worse than in 1969, when it was 76.4% majority.

2. No action had been taken to desegregate Woodlawn Junior High.

3. Neither of the alternative plans to avoid the segregated status of East High School - integrating the school or redistributing its pupils to the the other high schools - had been effectuated.

4. The Board had not approved any educational parks.

5. The middle school program had floundered after only two middle schools were established.

(S-103).

Eight years after the Yerby Dixon Appeal, it was clear that the Board had not accepted, and would not accept, the responsibility to integrate the Buffalo schools.

d. The State Defendants' Response to City Defendants' Inaction. Two broad and specific enforcement powers are granted to the Commissioner of Education under New York Education Law: removal of school officers and withholding of funds for "wilfully disobeying any decision, order, rule or regulation of the regents or of the commissioner of education." New York Education Law, §306(1) (McKinney's 1969). Commissioner Nyquist was well aware of the powers that he was authorized to use.[61]

In August 1973, after the Board rejected the State's integration plan, and after the Board president had written the Deputy Commissioner of Education that

> if your discussion with [the Board] should in any way involve forced bussing then, in view of the attitudes of the majority of the Board, there would be no point to such a discussion.
> (PX 267).[62]

the Commissioner had a show cause order drafted. (PX 298, at CW 7.5). This show cause order, a necessary prerequisite to either removal of school officials or withholding of funds [New York Education Law, §306(1) (McKinney's 1969)], had not been served as of the day this case was tried in October of 1974.[63]

Mr. Nyquist admitted at trial that between January 1972, when he requested the full scale integration plan, and the date of trial, nothing of consequence had happened: "maybe minor decisions, but very minor. I see no real substantive change." (Record, Vol. V, at 39). In addition, Mr. Nyquist agreed that the Board's actions "clearly and unequivocally violate the Regents policy" and that the Board had willfully defied the Commissioner's instructions. (Record, Vol. V, at 39-40). The Commissioner testified: "I don't think you can achieve racial desegregation here in Buffalo without an order from the Commissioner or from the Court." (Record, Vol. V, at 43). Mr. Nyquist's excuse for not having brought a show cause order to make the Yerby Dixon decision a final order, that he was incapacitated by a heart attack, is not persuasive. The State's authority cannot be so dependent on the health of any one person, and New York State law authorizes the Deputy Commissioner to fill in for a disabled Commissioner.[64/] The State defendants argue that "it is only required that they take reasonable steps to implement Regents' policy and to enforce the Commissioner's order of February 15, 1965 [Yerby Dixon]. This they have done." (Post-trial Brief for State Defendants, at 15). Without considering whether the State defendants correctly interpret the law, this court is convinced that neither the Commissioner nor the Regents have taken "reasonable steps" to alleviate the segregation in the BPSS. At the time this case was submitted for decision, ten and one-half years had elapsed since the 1965 Yerby Dixon Appeal and no significant improvement in desegregating the public schools in Buffalo had taken place. The Commissioner's actions over those ten years amount to a mountain of paper work with little substantive results. The lack of effective action by the Regents and by the Commissioner of Education has continued, and in some instances aggravated, racial segregation in the Buffalo public schools.

It is significant when considering the protracted negotiations between the Board and the Commissioner's office, which continue to this day, to ponder the hypothetical situation posed by plaintiffs' counsel at the final arguments. If the Buffalo School Board had decided to shorten the state-mandated 190-day school year [New York Education Law §3204(4)(a)(McKinney's Supp. 1976)], on its own initiative, one would expect the State to react with great alacrity to enforce its attendance statute.

Yet, this decade-old integration mandate has been "more honour'd in the breach than in the observance." (W. Shakespeare, Hamlet, I, iv, fourteen).

e. Mayoral Action. At the time this suit was filed, School Board members were appointed by the Mayor, subject to the confirmation of the Common Council. [New York Education Law, §2553(3)(McKinney's 1970)]. The plaintiffs allege that the late Mayor Frank A. Sedita's appointment of Mrs. Carol Williams to the Board of Education in early 1972 was done with segregative intent. This appointment occurred just after Commissioner Nyquist had requested the Board to submit an integration plan that would effect a racial balance in each school approximating the district-wide percentage.

As the Supreme Court stated in Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974), such an allegation presents a sticky judicial and legal problem because "judicial oversight of discretionary appointments may interfere with the ability of an elected official to respond to the mandate of his constituency." 415 U.S., at 615. Because the Supreme Court ruled that there was no proof of discriminatory appointments in the Mayor of Philadelphia case, it did not resolve this problem. 415 U.S., at 621.

In the present case, the only evidence of the Mayor's intent is a quote from a letter he once wrote indicating that he appointed Mrs. Williams because she was opposed to cross-bussing. [S-130(b)]. We feel that this is insufficient evidence to find discriminatory intent on the part of the Mayor.

IV-G. CONCLUSION ON SCHOOL EVIDENCE

As the Supreme Court has often noted, "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment." Palmer v. Thompson, 403 U.S. 217, 224 (1971). The same can be said for the motivation or motivations behind the actions of a school board or board of regents. When, however, the court is faced with a decade and more of intransigence and obstruction, of delay and procrastination, the interpretation of motivation becomes less difficult. The record in this case substantiates plaintiffs' claim that the Board of Education, the Superintendent of Schools, the Commissioner of Education and the Board of Regents intentionally created and maintained, in substantial part, the segregation in the BPSS.

The court again notes that some efforts were made to alleviate the segregation and promote integration. Specific examples include the Board's voluntary integration program that enabled some 2,600 inner-city youths to attend peripheral schools, compensatory education programs, and the increase in minority administrators. But these steps were inadequate in themselves [see the district court opinion in Bradley v. Milliken, 338 F.Supp. 582, 591-92 (E.D.Mich. 1971)], and their beneficial results were substantially nullified by contrary actions, such as the transfer and optional area policies that resulted in 2,000-4,000 white students shifting to predominantly white schools as the court has discussed supra, in section IV-C of this opinion.

The plaintiffs have proved that various schools in the BPSS are segregated, that this segregation was intentionally caused by the defendants, and that a substantial and meaningful portion of the school district has been intentionally segregated. There is no need, as the Keyes case explains, for the plaintiffs to prove de jure segregation as to each segregated school or student in the system:

> [W]here plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding

> of the existence of a dual school
> system.
> Keyes, supra, 413 U.S., at 201.

The language transfer device that allowed white students living in the East High School district to avoid East and attend South Park or Kensington Highs; the districting of Woodlawn Junior High in 1964 that guaranteed an all-black student body; the transfer and optional areas policies that enabled white students to avoid schools with substantial numbers of minority students; the discriminatory admissions practices at some vocational high schools; the assignment of teachers and administrators on the basis of race; the discriminatory hiring practices of the Board; the refusal of the Board of Education to devise and implement an effective integration plan; the Common Council's obstruction of positive integration steps that the Board did take; the failure of the Board of Regents and the Commissioner of Education to take effective steps to end the segregation in Buffalo's public schools -- all of these are evidence of a systematic program of segregation.

Defendants have not met their burden of showing that the instances of segregation were not caused by their design or device. Keyes, supra, 413 U.S., at 210. The evidence of segregative acts, briefly catalogued in the preceding paragraph, demonstrates the inadequacy of the City and State defendants' defenses. The Board's "neighborhood school" policy, long cited as a racially neutral, rational assignment device, stands exposed as a shibboleth. It was followed when its results were seen as acceptable; it was disregarded and subverted when the Board saw fit. When the City defendants do admit segregative actions, they attempt to minimize their responsibility by claiming that the segregative effect was "not substantial." (Post-trial Brief for City Defendants, at 14, 15, 21, 22, 26, 30, 31). The evidence proves otherwise.

The State defendants' attempt to wash their hands of any involvement in the segregation that characterizes the BPSS, by claiming they have done all that is legally required of them, is similarly unpersuasive. Nothing could have encouraged the City defendants' procrastination and recalcitrance more than the lack of effective action by the State defendants. In the final analysis, the State defendants are entrusted with the authority over and responsibility for the educational system in New York State. They must be held accountable for their actions and omissions that allowed and encouraged the BPSS's increasingly severe segregation.

Notwithstanding the culpability of the City and the State defendants, the court does acknowledge that some efforts by all defendants, evidencing various degrees of support for desegregating the BPSS, were shown. Unfortunately, these efforts were too insignificant to alleviate the constitutional harm that had been done.

IV-H. HOUSING

1. THE EVIDENCE

None of the parties to this lawsuit dispute the existence of severe residential segregation in the City of Buffalo, nor do the parties dispute the fact that the housing problems have contributed to the racial isolation and imbalance present in the Buffalo public schools. The City defendants claim that the housing segregation is the direct cause for the school segregation, that they are blameless for the existence of residential segregation and are not constitutionally required to correct it. (Answer for City Defendants at ¶¶17, 19; Post-trial Brief for City Defendants, at 1). Consequently, they argue that any evidence regarding the housing situation is irrelevant to the issue: intentional segregation in the BPSS. (Record, Vol. IV, at 143, 161-162, 173; Vol. V, at 110-111; Vol. VI at 10). The State defendants agree that the housing evidence should have been stricken at trial as irrelevant. In addition, they argue that they have no legal responsibility for housing matters in New York State. (Post-trial Brief for State

Defendants, at ¶¶ 36, 37).

The plaintiffs introduced evidence tending to show that both the containment of minorities in certain areas of the City, and the exclusion of minorities from suburban areas, did not occur by chance. This evidence can most easily be discussed by dealing with the allegedly discriminatory parties seriatim: (1) The Federal Government; (2) The Buffalo Municipal Housing Authority [BMHA], (3) The Real Estate Industry, and (4) The City of Buffalo.

(1) The Federal Government

During the 1930's, the Federal Government's explicit policy, as described in the Underwriting Manual of the Federal Housing Administration [FHA], was to keep racial populations separate. When rating a location, FHA valuators were advised that protection from adverse influences was "one of the most important features." (PX 228, pt. II, at ¶226). Adverse influences were defined to include "infiltration of inharmonious racial or nationality groups." (Id., at ¶310). The valuators were further advised to award high ratings only to those areas where the most effective exclusionary devices, such as zoning regulations and deed restrictions, were employed, "inasmuch as these provide the surest protection against undesirable encroachment and inharmonious use." [Id., at ¶284(1)]. It was specifically recommended that a "[p]rohibition of the occupancy of properties except by the race for which they are intended" be included in the deed restrictions. [Id., at ¶284(3)(g)].

The Federal Government also funded housing projects, especially war housing, that were purposely segregated. (PX 229, at 3; see (2), infra).

(2) The Buffalo Municipal Housing Authority

As shown in Table 15, four major public housing facilities were constructed in Buffalo in the late 1930's under the aegis of the BMHA, a municipal corporation formed under the laws of New York State by the City of Buffalo in 1934. [PX 229, at 2; see New York Public Housing Law §§403, 404 (McKinney's Supp. 1976)].

TABLE 15

BMHA HOUSING PROJECTS - 1930's

PROJECT NAME	LOCATION	UNITS	RACIAL MAKEUP
Lakeview	W.Side, Waterfront	668	All white
Commodore Perry	Louisiana Street	772	All white
Willert Park	Jefferson Avenue & William Street	172	All black
Kenfield	Kensington area	658	All white

SOURCE: Record, Vol. IV, at 145-152; PX 229, at 3.

[The Kenfield project was originally built as a PWA project, but was taken over by BMHA. (Record, Vol. IV, at 151)].

This segregation in public housing continued as new housing was constructed during the war years, as shown in Table 16 below.

TABLE 16

BMHA HOUSING PROJECTS - 1940's

LaSalle Courts	North W.City Line	206	All white
Langfield Homes	Kensington area	594	All white
Carver Apts.	William Street	42	All black
Talbert Court	William Street	73	All black
Ti-o-run-da	Cheektowaga	1,050	All white
Sheridan-Parkside	Town of Tonawanda	1,200	All white

SOURCE: Record, Vol. IV, at 155-158; PX 229, at 3-4.

[These public housing projects were managed by BMHA through Niagara Frontier War Housing. (PX 229, at 3)].

The testimony at trial demonstrated that these various projects, whose locations are indicated on map 5, *infra*, were built in either white or black residential areas, and remained totally segregated through about 1950. (Record, Vol. IV, at 168).

Newspaper articles from the 1940's submitted into evidence refer to Willert Park as specifically designated for Negroes. (PX 207, 208, 210, 212). When Willert Park became overcrowded and many black defense workers were in need of housing, an additional 200-unit facility was authorized in 1941 by the Federal Government, specifically for Negroes. (PX 213, 214). Several white residential sites were selected, including Cheektowaga, South Buffalo, and the Fillmore-Eagle Streets area. In each of these areas, public protests arose and the site was rejected. (PX 214, 215, 216 and 221). Among the remarks attributed to protesting community spokesmen at the time were the following:

> Of course the Negro workers should be taken care of but this is not the place. There are none living or working here now,

and

> The Negroes, who are certainly in need of better living conditions, would be far happier were they given a city of their own outside of Buffalo.

(PX 215 and 217).

Ultimately, an addition to the all-black Willert Park project was built. (Record, Vol. IV, at 176).

The evidence at trial was conflicting as to whether or not the public housing projects are still segregated. Mr. Victor Einach, who worked for the BMHA from 1939 to 1940, and with the New York State Division on Human Rights from 1941 through 1973, testified that most of the units "are pretty well integrated." (Record, Vol. IV, at 169). However, Mr. Cleon Service, a black realtor with some forty years' experience in the Buffalo real estate market, and the vice-president and member of the executive committee of Housing Opportunities Made Equal [HOME], testified that even after 1946, when the BMHA had agreed to end its segregative housing assignments, such segregative actions continued, and that

> it wasn't until 1970 that we actually were able to sit down with them and work out what we felt was the beginning of a satisfactory resolution of their practices of discrimination and assignment and refusal to transfer blacks from the predominantly black projects at that time.
> (Record, Vol. IV, at 179).

Mr. Anthony Dutton, a member of the Board of Directors of HOME, testified that the public housing administered by the BMHA was still heavily segregated, as the following table indicates, as of 1966.

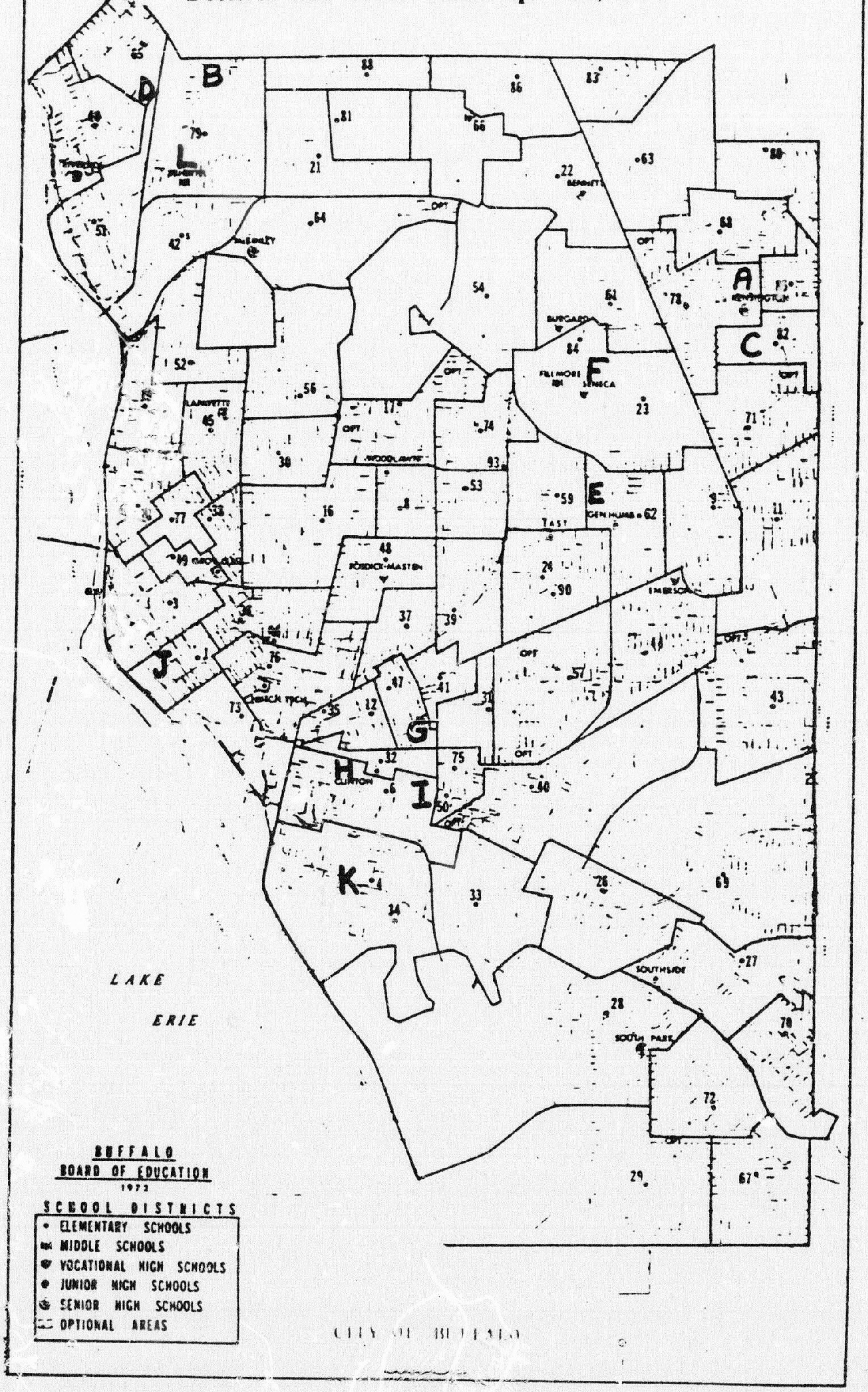
TABLE 17

PROJECT NAME	UNITS	RACIAL MAKEUP	LOCATION
Kenfield	658	3% black	A
LaSalle	206	3% black	B
Langfield	594	6% black	C
Shaffer	233	3% black	D
Ferry-Grider	210	6% black	E
Kensington Heights	371	6% black	F
Willert Park (including extension)	472	100% black	G
Ellicott Mall	590	99% black	H
Talbert Mall	763	99% black	I
Lakeview	668	23% black	J
Commodore Perry	772	19% black	K
Jasper Parish	212	13% black	L
Commodore Perry Ext.	472	58% black	K

SOURCE: Record, Vol. V, at 125-128.

[Location of these projects shown on map 5, *infra*].

Mr. Dutton stated that he relied on BMHA's Research Division for the statistics, and that no appreciable change in these statistics had occurred by 1970.


A
B
C
D
E
F
G
H
I
J
K
L
KENSINGTON
BURGARD
FILLMORE
SENECA
BENNETT
LAFAYETTE
FOSDICK-MASTEN
EMERSON
CLINTON
SOUTHSIDE
SOUTH PARK
OPT
LAKE ERIE
BUFFALO
BOARD OF EDUCATION
1973
SCHOOL DISTRICTS
ELEMENTARY SCHOOLS
MIDDLE SCHOOLS
VOCATIONAL HIGH SCHOOLS
JUNIOR HIGH SCHOOLS
SENIOR HIGH SCHOOLS
OPTIONAL AREAS
CITY OF BUFFALO

(Record, Vol. V, at 124, 125).[65] The figures supplied by Mr. Dutton stand unrebutted, calling into question Mr. Einach's observation that the public housing is "pretty well integrated," supra, at 138, and census tract data bear out the continuance of a segregated city. (PX 289-293).

The statistics in Table 17 prompted the HOME organization to investigate the BMHA. Mr. Dutton testified that HOME's study found that federal and state law required a housing authority running more than one housing project to operate all the projects as a single unit with regard to application and assignment of tenants. The BMHA, however, allowed the individual project managers to make use of an informal waiting list procedure, which enabled white applicants to avoid the identifiably black projects. (Record, Vol. V, at 129-137). Thus, the segregation initiated by the FHA was maintained by the BMHA.

(3) The Real Estate Industry

Mr. Service, the realtor, also testified about the state of the private real estate business in the

Buffalo area after World War II. He stated that it was extremely difficult for a black buyer to purchase a home in a white neighborhood. White realtors told Mr. Service that "they could not either morally or ethically permit [him] to sell black families into an all white community." (Record, Vol. IV, at 182).

In the late 1950's, when the real estate industry in the Buffalo area introduced the multiple listing system, under which all brokers send their listings to a central file that is then distributed to all the members of the system, there was fear among white brokers that this procedure would precipitate a black influx into the suburbs. (Record, Vol. IV, at 187). The suburban realtors were so worried at this prospect that they broke off and formed their own separate real estate board from which blacks were excluded. (Id., at 187, 191-192). The problem was so acute in the white realtors' eyes that they devised a system that avoided a black realtor showing a white prospective buyer a home, even in a white neighborhood. The white brokers "felt any incident of a black showing up in all white areas would create a furor, and they wanted to avoid it." (Id., at 189). This practice continued into the 1960's.[66] (Id., at 191).

(4) The City of Buffalo

All three of the above forces had helped to cause the black population in the City of Buffalo to be squeezed into a central city area in the 1950's. At that time, the Ellicott District redevelopment, an urban renewal program, resulted in the City's purchase of large areas of the Ellicott District and subsequent razing of the purchased homes. The evidence at trial showed that almost all of the dislocated black families were relocated in the Masten District area, which exacerbated the segregated housing conditions. (See map 5 , supra). The relocation was described in Buffalo's official Community Renewal Program, quoted in the City's Model Cities grant application which was introduced into evidence:

> Although at the time there was a sufficient number of adequate housing units available, the relocation program failed to take into account the residential exclusion problem which restricted the movement of non-whites to the Masten and Ellicott Communities. This restriction, though unwritten and unstated, nevertheless, reduced the

> supply of housing units available to the non-white families displaced by the Ellicott Project to an unsatisfactory level. Thus, relocation of the Ellicott residents was accomplished by increasing the density of the remainder of the Ellicott Community and the lower Masten area mainly by virtue of illegal conversions of single and two, multi-family structures and by the doubling up of families in existing units. The impaction of these two areas in turn led to the speeding up of the processes of blight formation in the remainder of the Ellicott and Masten areas.
> (PX 260, pt. III, at 25, 26).

At trial, plaintiffs called as a witness Martin Sloan, General Counsel of the National Committee Against Discrimination in Housing, Inc. Mr. Sloan, who has extensive experience in Government agencies dealing with segregation in housing, such as the United States Commission on Civil Rights and the Home Financing Agency, was asked at trial whether he had an opinion as to how long it would take to alleviate the results of the discriminatory practices and policies followed by the Federal Government. Mr. Sloan's answer appears to be equally applicable to the discriminatory practices of BMHA, the City, and the private real estate industry:

> Well, it depends. If the federal agencies could turn around 180 degrees, by that I mean match the zeal, with which they carried on the discriminatory policies in the '30's and '40's, with a similar enthusiasm in carrying out equal housing opportunities and obligations, I would estimate two to three generations. At the rate they are going now, which is essentially a passive attitude toward their enforcement responsibilities, a much, much longer time. I couldn't estimate at all. (Record, Vol. VI, at 47).

2. THE RELEVANCY OF HOUSING SEGREGATION

The State and City defendants cite Milliken v. Bradley, 418 U.S. 717 (1974), as authority for the proposition that, in a case such as this, housing evidence is not relevant. In Milliken, a school desegregation suit involving the public schools of Detroit, the Court of Appeals, in affirming the district court's decision that the defendants were guilty of segregative actions, had this to say about the housing evidence introduced at trial:

> This record contains a substantial volume of testimony concerning local and State action and policies which helped produce residential segregation in Detroit and in the metropolitan area of Detroit. In affirming the

> District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation. 484 F.2d 215, 242 (6th Cir. 1973).

The Supreme Court took note of this in its decision:

> Accordingly, in its present posture, the case does not present any question concerning possible state housing violations. Milliken, supra, 418 U.S. at 728 n.7.

It cannot be said that either the Court of Appeals or the Supreme Court held the housing evidence inadmissible or irrelevant. The only certainty is that neither court relied on the housing testimony. Because of the defendants' primary reliance on the residential composition of Buffalo as a defense to this action, we feel it necessary and appropriate to express our findings on the housing evidence. It is too facile an argument to say that since this is a school desegregation suit, housing evidence is necessarily irrelevant. If the school suits have shown anything, they have demonstrated convincingly, in the words of Judge Weinstein, that

> [h]ousing and school patterns feed on each other. The segregated schools discourage middle class whites from moving into the area and the segregated housing patterns lead to segregated schools.
> *Hart v. Community School Board*, *supra*, 383 F.Supp. at 706.[67]

In *United States v. School District of Omaha*, *supra*, 521 F.2d 530 (8th Cir. 1975), *cert*. *denied*, 44 U.S.L.W. 3280 (Nov. 11, 1975), the court stated in a footnote:

> In light of the conclusive evidence of intentional segregative practices by the school district, we have not addressed ourselves to the appellants' contention that the public and private racial discrimination in housing provides an alternate ground for ordering all-out school integration. However, we do subscribe to the Fourth Circuit's reasoning:
>
> > . . . If residential racial discrimination exists, it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination. . . .
>
> *Brewer v. School Board of City of Norfolk, Va*., 397 F.2d 37, 41-42 (4th Cir. 1968) (en banc).
>
> 521 F.2d at 537 n. 11.

The evidence proves that the residential segregation in Buffalo was caused, in substantial part, by the policies and practices of the Federal Government, the BMHA, the private real estate industry and the Common Council of the City of Buffalo. The citizens of Buffalo, both black and white, and particularly the public school children, have been affected by the legacies of these actions, stretching back over many generations, which have contributed to a wall of misunderstanding.

The City defendants cannot use the residential segregation as a defense because, as the evidence demonstrates, they helped to cause the residential segregation through the Ellicott Relocation Program. The Common Council's portable classroom ordinance, discussed in section IV-F of this opinion, supra, and the Board's districting of Woodlawn Junior High School, discussed in section IV-B of this opinion, supra, are examples of how the City defendants attempted to sustain and prolong the racial separation in schools that residential segregation encourages. But, even had the City defendants not actually contributed to residential segregation, to allow them to hide behind a condition they have long been aware of, that they have the authority to alleviate and that they once, in the City's Model Cities application, committed themselves to rectify, would be untenable.

Given the purposeful residential segregation in the City of Buffalo, the School Board's "neighborhood school policy" was not, and could not be, racially neutral. The Board's continued reliance on it fostered and maintained school segregation. As the district court in Oliver v. Kalamazoo Board of Education, supra, 368 F.Supp. 143 (W.D.Mich. 1973), stated:

> The school board should not be heard to plead that its neighborhood school policy was racially neutral when in fact "state action under the color of law" produced or helped to produce the segregated neighborhoods in the first place.
> 368 F.Supp. at 183.

The Fifth Circuit has noted that "[w]hen the segregated housing patterns are the result of 'state action', we are faced with double discrimination." United States v. Texas Education Agency, 467 F.2d 848, 863-64 n.22 (5th Cir. 1972) (emphasis in original), motion to clarify opinion denied, 470 F.2d 1001 (5th Cir. 1973)(en banc). And the district court in Morgan v. Hennigan, supra, 379 F.Supp. 410 (D. Mass. 1974), ruled that "when school officials have followed for at least a decade a persistent course of conduct which intentionally incorporated residential segregation into the system's schools, that conduct is unconstitutional." 379 F.Supp. at 470.

This court cannot allow the Common Council and the Board to avoid liability by pointing the finger at each other. As the record reveals, neither has taken adequate steps within the ambit of their own authority to cure segregative situations in the community,and in fact both have taken some steps which have caused the segregation in the schools and in the community at large to continue.

Although the State Commissioner of Education and Board of Regents cannot be held directly responsible for housing segregation, they cannot use the unconstitutional actions of others to excuse their own failure to act, because, in the final analysis, the State defendants are responsible for education in New York.

The court finds, therefore, that the defense of residential segregation, like the "racially neutral" neighborhood school policy defense to which it is intimately related, is essentially a smokescreen. Furthermore, the court finds that the City defendants' past action and inaction which have, to a substantial degree, caused, exacerbated or maintained the segregated housing conditions, are separate and independent alternative grounds for holding them constitutionally liable for the segregated condition of the schools in Buffalo.

ORDER

It is the finding of this court that the Board of Education, the Superintendent of Schools, the Commissioner of Education, and the Board of Regents have violated the plaintiffs' fourteenth amendment right to equal protection under the laws by intentionally causing and maintaining a segregated school system. Defendants, their successors and their agents are therefore enjoined from taking any further action in violation of plaintiffs' rights under the Constitution.

The court and the parties must now prepare to deal with phase two of this lawsuit - the remedy that is to be devised to end the unconstitutional segregation in the public schools of Buffalo. There are several preliminary considerations that all parties should keep in mind as the remedy is hammered out.

This court is not, and does not want to be, a school administrator. It does not have the specialized training, the knowledge or the experience that belong to the defendants. The limited nature of the court's function has been clearly delineated by the Supreme Court:

> Our cases, of course, make clear that the initial responsibility for devising an adequate desegregation plan belongs with school authorities, not with the District Court. The court's primary role is to review the adequacy of the school authorities' efforts and to substitute its own plan only if and to the extent they default.
> Milliken v. Bradley, supra, 418 U.S. 717, 809 (1974). (Marshall, J., dissenting) (emphasis added).

It is, therefore, the responsibility of the defendants to come forward with a plan that comports with the Constitution. The problems presented are difficult and will require rigorous effort to overcome, but overcome them the defendants must. The court is, of course, aware that both the Commissioner and the Board have already worked out plans on their own, under the Commissioner's impetus, but whether or not such plans will pass constitutional muster is not to be guessed at.

There are many diverse factors and influences that must necessarily be considered by the defendants, but this court's sole

> objective in dealing with the issues presented by [this case] is to see that school authorities exclude no

> pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.
> Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. 1, 23 (1971).

Acknowledging the complexity of these cases, the Supreme Court has set only one guideline: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." Green v. County School Board, 391 U.S. 430, 439 (1968) (emphasis in the original).

Therefore, it is ordered that the City and the State defendants prepare plans to desegregate the BPSS. The proposed plans must encompass the staff segregation as well as the student segregation.

The Supreme Court, in Milliken v. Bradley, has stated:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must

> first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. Milliken v. Bradley, supra, 418 U.S. 717, 744-745 (1974).

On the present state of the record, there does not appear to be any basis for the court to order a metropolitan-wide remedy. However, it should be noted that Milliken does not prevent the State from itself devising and implementing a metro response to what is essentially a metropolitan problem. Nor does Milliken prevent a plan that would encompass the metropolitan areas on a voluntary basis, and the State defendants shall consider this in their plan.

All parties are directed to appear on Wednesday, May 19, 1976 at 2:00 p.m. The individual defendants and witnesses are not required to be present. But all attorneys shall be accompanied by representatives of the agency defendants who are acquainted with the problems of preparing a plan. The timetable for submission of the plan and other problems will be discussed.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: April 30, 1976

FOOTNOTES

1/

42 U.S.C. §1983, entitled, Civil Action for Deprivation of Rights, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2/

The pertinent section of the fourteenth amendment reads as follows: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

3/

Plaintiffs' complaint cites 28 U.S.C. §2201 as a jurisdictional basis. This section does not confer jurisdiction on a court where it would not otherwise exist, but merely provides the court with remedial powers. See Nickerson v. United States, 513 F.2d 31, 33 (1st Cir. 1975); Kinsella v. Board of Education of Central School

District No. 7, 402 F.Supp. 1155, 1157 (W.D.N.Y. 1975).

4/ Stipulated material will be referred to throughout the text by reference to the numbered stipulation, for example, (S-#).

5/ As Judge Gurfein has noted with considerable understatement, most people are "as reluctant to admit that they have racial prejudice as to admit that they have no sense of humor." Hart v. Community School Board of Education, 512 F.2d 37, 50 (2d Cir. 1975).

6/ Exhibits will be referred to as PX # (Plaintiffs') and DX # (Defendants').

7/ N. Y. Educ. Law §3201 (McKinney's 1970).

8/ For the first decade or so after Brown, all school desegregation cases concerned southern schools. This case is one of many that have been brought in northern and western cities, such as Denver, Detroit and Boston. For an extensive list of the northern and western city school desegregation suits that have occurred, see United States v. School District of Omaha, 521 F.2d 530, 535, n.7 (8th Cir. 1975), cert. denied, 44 U.S.L.W. 3280.

9/ There was some discussion at trial about exactly how "segregated" or "integrated" are to be defined. Absolute separation of the races need not be proved to show "segregated" conditions. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). Nor does the court need to set a precise numerical ratio to indicate what it considers segregated or integrated schools. Suffice it to say that substantial separation of the races amounts to "segregation" of the races. See 20 U.S.C. §1720(c). Throughout this opinion, the terms "imbalance," "segregated," "predominantly majority" or "predominantly minority" are used interchangeably and without a precise mathematical connotation.

The question of whether different minority groups should be considered separately in a desegregation suit arose in Keyes, supra. The Supreme Court there ruled that blacks and hispanic Americans should be considered together when defining a "segregated" school. 413 U.S. at 197-98. For the BPSS, this distinction is not of significant dimensions, since as of October 1973 Spanish-surnamed students comprised only 3.1%, American Indians .8%, and oriental students .1% of the student population. (PX 6, at 6). Unless otherwise noted, minority population figures include all four of these groups.

10/ The court notes the debate, both in the legal and in the public arenas, over the significance between de jure and de facto segregation. Since the plaintiffs in Keyes pleaded and proved de jure segregation, the Supreme Court was not forced to decide whether merely proof of de facto segregation constitutes cognizable legal wrong. Keyes, supra, 413 U.S. at 198. Justice Douglas nevertheless urged that ". . . it is time to state that there is no constitutional difference between de jure and de facto segregation, for each is the product of state actions or policies." Keyes, supra, 413 U.S. at 216

(Justice Douglas concurring). Justice Powell argued that the distinction had slowed the process of integration in the country at large and that it should now be abandoned. Keyes, supra, 413 U.S. at 217-236. He quoted Senator Abraham Ribicoff:

> Somehow residential segregation in the North was accidental or de facto and that made it better than the legally supported de jure segregation of the South. It was a hard distinction for black children in totally segregated schools in the North to understand, but it allowed us to avoid the problem. 118 Cong.Rec. 5455 (1972). Keyes, supra, 413 U.S. at 219 n.5.

See also Brief for American Jewish Committee as Amicus Curiae at 6-13.

Our circuit adheres to the de jure/de facto distinction, Hart v. Community School Bd. of Educ., 512 F.2d 37, 49 (2d Cir. 1975), and since plaintiffs have alleged de jure segregation, this court need not enter this debate.

11/

The Supreme Court further amplified the defendants' burden with this comment:

> This is not to say, however, that the prima facie case may not be met by

evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did.
Keyes, supra, 413 U.S. at 211.

12/

Buffalo's Population 1900 - 1970:

1900	352,387
1910	423,715
1920	506,775
1930	573,076
1940	575,901
1950	580,132
1960	532,759
1970	462,768

[PX 263, at 5 (citing U.S. Census Reports, 1900-1970)].

13/ Although complete racial population statistics are not available to the court for the years before 1960, the evidence at trial indicated that the black population in Buffalo grew as follows.

Black Population in Buffalo

1910	1,773
1930	13,000
1940	17,500
1943	25,656
1946	30,000

SOURCE: PX 229, at 1.

It was estimated that three out of five new citizens coming to Buffalo during the war years were black. Id.

14/

See APPENDIX.

14a/

Several factors have been cited to explain the disproportion between the percentage of the black population in the City as a whole and the percentage of black population in the public schools, a phenomenon that is not unique to the BPSS. Among the factors are a higher black birth rate, the suburban exodus of whites, and the disproportionately high enrollment of whites in private and parochial schools. See Farley, Residential Segregation And Its Implications For School Integration, 39 Law and Contemporary Problems 164, 169-174 (1975).

15/

This phenomenon is common to many cities. Id. at 172.

16/

ELEMENTARY SCHOOL GROWTH & DECLINE

	MINORITY	MAJORITY	TOTAL
Jan. 66	17,756 (35.9%)	31,461 (64.1%)	49,217
Oct. 73	17,231 (45.5%)	20,671 (54.5%)	37,902

SOURCE: PX 6, at 19. This exhibit is the Ethnic Census of the Buffalo Public Schools 1973-74. The above figures are from page 19. Figures at page 7 of the same exhibit are slightly different.

ELEMENTARY SCHOOLS GROWING: 22, 27, 32 (Build Academy), 34, 44, 62, 67, 70, 82 and 86.

ELEMENTARY SCHOOLS DECLINING: 1, 3, 4, 6, 8, 9, 11, 12, 16, 17, 18, 19, 21, 23, 26, 28, 29, 30, 31, 33, 36, 37, 38, 39, 40, 41, 42, 43, 45, 47, 48, 49, 51, 52, 53, 54, 56, 57, 59, 60, 61, 63, 64, 65, 66, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 85, 88, 90, 93.

Id., at 13-19.

16a/

This suit was tried in October 1974. The most recent figures in evidence at trial on schools, students and staff in the BPSS were for the 1973-1974 school year. (PX 6).

17/

Included in the 77 elementary schools are four special schools - 24, 35, 50 and 84. There are also three other special schools with small enrollments that are not included in these figures. They are the Child Care Center, Immaculate Heart of Mary Home, and St. Augustine's.

18/

N.Y.Educ. Law §3201 (McKinney's 1970).

19/

These examples assume that the children would attend academic high schools. If a child chooses to attend a vocational-technical high school, he can choose any vocational-technical school in the city. See section IV-D of this opinion, infra.

20/

Like all rules, there are exceptions. The principal exception that developed over the last decade was the voluntary integration program under which inner-city students could attend predominantly white peripheral schools. See Record, vol. VII, at 108-111. An example of this is West Hertel Middle School, where the minority students, comprising 28% of the student body, are primarily

-x-

from the inner-city schools. There are other exceptions, also. See discussion in section IV-C of this opinion, infra.

21/ The word "district" in this sense refers to an attendance zone for a particular school, and does not indicate a complete school system, as in BPSS or Central School District No. 1.

22/ The hardship category apparently includes physical and emotional problems, harassment and social adjustment. See page 58 , infra.

23/ An optional area is unique in that a student living there can attend the school in whose zone he lives, or another school. The "optional" school's district is usually contiguous to his normal school's district. See section IV-C-2 of this opinion, infra.

24/ This area, to the east of Main Street, was bounded by East Ferry Street, Michigan Avenue, Virginia Street and Jefferson Avenue.

25/

The Board's Director of School Attendance testified at a pre-trial deposition, offered into evidence at trial, as follows:

> Now, in the East High School District a lot of the white children used to take Polish because in the East High School District it is predominantly a Polish area, it was a Polish community, and they used to come down here and ask for Polish, and we used to allow them to go to maybe South Park or Kensington High School, . . . (PX 296, at 13).

26/

East High School enrollment was estimated to be in the range of 80% black in the United States Civil Rights Commission Report in 1963. (PX 10, at 35).

27/

In their attempt to show that East High School is "an all black school in an all black neighborhood" (Post-trial Brief for City Defendants, at 25), the City defendants called Mr. Anthony Girard who testified about the census tracts comprising the East High attendance zone. (Record, vol. VIII, at 8-18). He listed fourteen census tracts, and then explained their racial composition.

All but two of these tracts, listed in DX 9, are overwhelmingly black, and the import of his testimony was that the East High district is overwhelmingly black. The court notes that certain census tracts, which are overwhelmingly white, that are also contained in part in the East High district, were left out of DX 9 and were not mentioned in Mr. Girard's testimony. See PX 289, 290, 291 (census tracts 16, 24, 28, 29).

28/ The Department of Health, Education and Welfare's Preliminary Compliance Review of the BPSS, PX 264, at 690-691, indicates that even by 1960 East was the black academic high school in Buffalo, as the following figures show:

East	- 52.4%	minority
Bennett	- 12.8%	"
Grover Cleveland	- 10.5%	"
Kensington	- .3%	"
Lafayette	- 18.2%	"
Riverside	- .7%	"
South Park	- 2.8%	"

29/ In June 1973, the Board of Education undertook a survey to discover where East district high school students were attending school. (DX 12).

30/ The Board of Education did take some of these East district students to court in order to force them to attend school. (Record, vol. VIII, at 37-40).

31/ *See* section IV-H of this opinion, *infra*.

32/ The area west of Main Street has traditionally been predominantly white.

33/ Staff members of the United States Commission on Civil Rights visited Buffalo to examine the BPSS in preparation for the staff report published in 1963. Among the individuals that were interviewed was Superintendent Manch. It was during an interview that Manch made this statement.

34/ Letter to Mr. Raphael DuBard, President of the Buffalo Branch of the NAACP, as quoted in PX 10, at 72-74.

35/ Woodlawn Junior High's enrollment was 99% non-white when the school first opened in 1964. In October 1973, it was 99.6% minority. [S-24(b); PX 6, at 21].

36/ The junior high schools and the years in which they were built are listed below.

Genesee-Humboldt	1961
Fillmore	1962
Clinton	1963
Woodlawn	1964
Southside	1966

Fillmore was changed to a middle school in 1967.

37/ Two interoffice memoranda from Board files were put in evidence that indicated that certain optional areas were instituted to promote integration. (PX 42, 43). The Board did not push this position at trial, and we consider these memos' explanation of the optional areas to be self-serving and inaccurate.

38/ Other courts have found transfer and optional areas policies having segregative effect to be evidence of segregative intent. See United States v. School District of Omaha, 521 F.2d 530, 540 n.19, 542 n.23 (8th Cir. 1975).

39/ Each of the vocational-technical high schools specialize in particular areas. The following is a non-comprehensive list.

Burgard	- automotive and airplane mechanics.
Emerson	- plumbing and carpentry.
Fosdick Masten	- cosmetology and health sciences.
Hutchinson-Central Technical	- advanced science and mathematics.
McKinley	- graphic arts.
Seneca	- food training.

(Record, vol. II, at 123-25).

40/ The court could find no reference in the trial record as to whether the other vocational-technical schools are all male or mixed. The court assumes that young women do attend these schools.

41/ Mr. Reville testified as follows:

A. . . . [I]t is my opinion that,-although I think the staff should be integrated and we have an affirmative policy of integrating staffs, given the racial composition of the schools as it is now, I believe that there ought to be black principals in predominantly black schools and there ought to be black teachers in predominantly black schools. This opinion is not only held by me, but most black teachers and most black principals, and I would say most of the black community because they exert a tremendous amount of pressure on me to assign these principals and teachers to predominantly black schools.

Q. This is in spite of the policy of the Board to integrate?

A. That's correct, and I feel we have made some headway in the policy, but if I were asked what I felt, do I believe a black principal should be in a predominantly black school, I would have to say again, given the racial composition of our schools now, I think black students need black principals and black teachers for role models and these black teachers and black principals are very important in the community because of their knowledge of the community and their rapport with the students and again my experience with

> black parents, black community groups, black principals and teachers and black Board members, the way, I think they are almost unanimous in agreeing with me on that particular point, so we are doing something we don't completely agree with."
> (Record, vol. VII, at 167-169).

42/ The constitutionality and/or legality of N.Y. Educ. Law, §2573 (McKinney's 1970), which has allegedly hampered the Board in its attempts to attract young minority teachers, is not before the court at this time. §2573 is being contested in this court in another suit, Build of Buffalo v. Board of Education, Civ-74-558.

43/ Until July 1, 1974, the Board members were appointed by the Mayor, N.Y.Educ. Law §2553(3)(McKinney's 1970), subject to confirmation by the Common Council. Since that time, members have been elected to their posts. N.Y.Educ. Law, §2553(10)(McKinney's Supp. 1976).

44/ The Board of Education must submit a budget each year for the Common Council's approval. The Common Council appropriates money for the Board of Education in the City budget, just like any other City department. N.Y.Educ. Law §2576(4)(McKinney's 1970).

State monies are apportioned to school districts through a complicated formula based on student attendance within the individual school systems. N.Y. Educ. Law §§3602, 3602a (McKinney's Supp. 1976). In addition, the State funnels funds appropriated by the Federal Government to the school districts of New York. N.Y. Educ. Law §3713 (McKinney's 1970).

45/ N.Y.Const. art. XI, §1 (1931) (McKinney's 1969) reads:

> The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

46/ The statute states the Commissioner's powers in hyperbolic terms, for his decisions can be reviewed on the limited grounds of arbitrariness. See Radford v. Gage, 59 Misc.2d 948, 301 N.Y.S.2d 282 (Sup.Ct. 1969).

47/ The first racial census of the public schools in New York State had been ordered by the Commissioner of

Education in late 1961 and was completed in 1962. This census only covered grades one to six. (PX 10, at 10; PX 282, at 2).

48/ The Project 1990 Middle School Plan for Buffalo, published in March of 1970, stated:

> It would take 24 years to integrate the schools of Buffalo at the present rate of progress, even if the white-black proportions in the total school enrollment stay constant. (PX 270, at 25).

Commissioner Nyquist, in a report to the Board of Regents in 1973, stated:

> It has been the exception, rather than the rule, that districts have voluntarily implemented desegregation plans. (PX 298, at CW 7.3).

49/ One of the suggestions for Woodlawn Junior High School was that it be made into a "magnet" school. The magnet concept involved making the school's curriculum so attractive that it would draw students from all areas of the city. (PX 278, at 12).

50/ As the court understands the "educational park" concept, one large area consisting of a complex of buildings would house school facilities ranging from fifth grade through community college and would provide a diverse and enriching educational opportunity. The hope was that such an educational park would draw both city and suburban students. (PX 270, at 8-10).

51/ The incoming inner-city students would not be resegregated at the receiving school by containing them in one large group in the portable classrooms. The portables merely increased the total capacity of each school.

52/ Section 201, Chapter XII of the City Ordinances, as amended June 11, 1968, is as follows: (The amended portion is underlined).

> Section 201. Schools, special restrictions and alternate requirements. Notwithstanding any other provisions of this chapter regulating the classification, design, construction or location of buildings or structures, when there presently

> exists on any site a building or buildings used and occupied for school classrooms or other school purposes, no additional buildings or structures shall be erected or placed on said site unless the additional building or structure is of the same type of construction as the main building located thereon.
>
> Subject to the foregoing limitation, it shall be lawful to erect in this city schools and colleges, including the auditoriums and gymnasiums connected therewith, designed, constructed and used in the manner set forth herein, any other provision of this chapter to the contrary notwithstanding. This section shall only apply to such buildings or structures which do not exceed two stories in height; and this section may only take precedence over other applicable provisions.

53/

Commissioner Nyquist stated at a press conference in February of 1972 that, "[i]f you carried out that plan [the 4-4-4], . . . we wouldn't be here today." (PX 105, at 6).

54/

Although twelve middle schools had originally been planned, it was later decided that six larger middle schools would be a more feasible idea. (Record, vol. I, at 181).

55/ Long before the adoption in 1968 of the 4-4-4 plan by the Board of Education, the schools in Buffalo were on a two tier K to 8 and 9 to 12 system. In the early 1960's the system was in a transitional state, moving towards a three tier system, which would involve grades 1 to 6 in the elementary schools, grades 7 to 9 in junior high schools, and grades 10 to 12 in high schools. (PX 10, at 5). The junior high school system never reached its full implementation and, at the time the 4-4-4 plan was approved by the Board, only 5 junior high schools existed. *See* n. 36, *supra*.

56/ According to various newspaper articles submitted into evidence, numerous civic groups expressed their opposition to the Council's refusal to fund the West Hertel Middle School, including the Buffalo Area Chamber of Commerce, the Rotary Club of Buffalo, the United Jewish Federation of Buffalo, Inc., the Buffalo Elementary and Secondary Principals and Assistant Principals Associations, the Buffalo Branch Inc. of the American Association of University Women, the Buffalo Public School Administrators

Association, and the Building Trades Council of Buffalo & Vicinity (AFL-CIO). (PX 164).

57/ Commissioner Nyquist at this time was the acting Commissioner of Education.

58/ For example, the Board at one point reported that in September 1970 Bennett High School was to be redistricted to improve racial balance. The improvement in the minority enrollment at Lafayette High School was approximately 1.3% (to about 30%), and in the enrollment at Grover Cleveland High School, approximately 2.2% (to about 14.6%). (PX 278, at 22).

59/ One Board member, at a February 1, 1972 Board meeting concerning the Commissioner's order, stated: "I suggest that we treat the Commissioner respectfully but as an adversary." [PX 105(a), at 95].

60/ No action has been taken on this report. (S-108).

61/ In a press conference in February of 1972, the Commissioner was questioned about possible alternatives if the Board failed to agree on a desegregation plan as he had ordered. Mr. Nyquist stated:

> Well I hope it won't come to that. I said to the Board this morning, got the same question, the Board is divided. I mean there's some difference of opinion on the Board as you probably know. I was asked that question and I said I'd jump off that bridge when I came to it because we have no precedent in this State, not to my knowledge, where a Board has refused to go along with a racial integration plan or a judicial decision of the Commissioner unless it was brought into the courts. There are two remedies in the law, and you can read the law as well as I can, when a Board -- see a school district or school board is an extension of the State. Education is a state function and when a Board refuses to carry out educational policies the Board of Regents or the Commissioner of Education, the two remedies that are specifically stated are the withholding of state aid and the initiation of proceedings to remove the Board. And I hope we don't have to come to that. (PX 105)(emphasis added).

62/ The Board president had written the Deputy Commissioner in January of 1973. Shortly thereafter, another Board member wrote Mr. Sheldon and said that the

> . . . letter is phrased in terms of bussing, but to be realistic what he is saying to you is that the Board majority, as presently constituted, has no interest in talking about school desegregation regardless of the manner in which it might be accomplished.
> (PX 268).

63/ A show cause order was finally served in January 1975. As of April 10, 1975, the hearing on this order (originally scheduled for February 14, 1975) had been indefinitely postponed. (Plaintiffs' Post-Trial Reply Brief at 5, filed April 10, 1975).

64/ N.Y. Educ. Law §101 (McKinney's 1969) states in pertinent part:

> The regents also may appoint and, at pleasure, remove a deputy commissioner of education, who shall perform such duties as the regents may assign him by rule and who, _in the absence or disability of the commissioner_ or when a vacancy exists in the office of commissioner, _shall exercise and perform the functions, powers and duties conferred or imposed on the commissioner by this chapter_.
> (emphasis added).

See Ex parte Anderson, 125 N.Y.S.2d 701, 282 App.Div.2d 993, _leave to appeal denied_, 128 N.Y.S.2d 581, 283 App.

Div.2d 748 (3rd Dept. 1954).

65/ More recent figures on housing were not admitted into evidence. It should be noted, however, that housing patterns are not changed overnight. See Testimony of Martin Sloan, Record, vol. VI, at 47, quoted in section IV-H(4) of this opinion, infra.

66/ It was not only in the sale and purchase of real estate that black citizens ran into discrimination. Testimony at trial indicated that rental housing in Buffalo is comprised mainly of owner-occupied two-family dwelling units. (Record, vol. V, at 111-112). Such housing is specifically exempted from coverage by Federal, State and City anti-discrimination housing laws. In 1967, the City of Buffalo applied to the Federal Government for a Model Cities grant. In the application, three barriers to open housing facing citizens in the model neighborhood area were detailed: short supply of rental housing, limited incomes of citizens in this area of the city, and discrimination in housing. (PX 260, pt. III, at 25). The application stated a number of goals the City would attempt to reach, including the removal of "all barriers to unrestricted, free and equal access to all Buffalo area housing." (Id., at 27). Among the approaches that the City specifically pledged would be adopted to achieve the open housing goal was "[t]he provision of total-coverage fair housing legislation together with machinery for vigorous enforcement." (Id., at 28). A resolution that directed the Corporation Counsel to draw up a total coverage fair housing law was introduced in the Common Council by Councilman Johnson in 1968. (PX 171). But, notwithstanding the City's pledge in its Model Cities application, no open housing legislation was ever passed. (Record, vol. IV, at 114-115).

67/ Whether residential segregation is due to State action or private action, or even if it merely is due to fortuitous external factors, the possible consequence is that

> [b]y rigidly adhering to geographic criteria over a long period of time the school board assures the parent who does not want his children to go to school with Negroes that this

> desire can be fulfilled by moving into a white neighborhood. The invasion-succession sequence is also fortified by the use of geographic criteria since it assures the white parent that if he moves out of the neighborhood "invaded" by the Negro, he will be leaving the Negro behind.
>
> Fiss, Racial Imbalance In The Public Schools: The Constitutional Concepts, 78 Harv. L. Rev. 564, 587-588 (1965).

APPENDIX

ERIE COUNTY SCHOOL DISTRICTS RACIAL PERCENTAGES

District	Total Enrollment	Black	Spanish Surnamed Americans	American Indian & Oriental	Other
Alden	1,492	0.2	0.2	0.1	99.5
Williamsville	11,660	0.9	0.1	0.8	98.2
Sweet Home	7,500	1.9	0.1	0.4	97.6
Eggertsville	1,115	1.3	0.9	2.3	95.5
Snyder	1,331	0.9	---	1.2	97.9
Amherst CHS	2,842	0.6	0.4	0.5	98.5
East Aurora	3,439	0.2	0.2	0.1	99.6
Buffalo	64,324	41.0	2.9	1.0	55.1
Cheektowaga	3,872	0.3	---	---	99.7
Maryvale	7,440	0.2	---	0.1	99.7
Cleveland Hill	2,566	0.4	---	0.3	99.3
Depew	3,998	0.8	*	0.2	99.1
Sloan	2,994	*	*	---	99.8
Clarence	4,639	0.3	*	0.3	99.4
Griffith Institute	3,395	0.1	0.3	0.6	99.1
Eden	2,781	*	0.4	0.1	99.4
Iroquois	3,988	0.1	*	0.2	99.6

District	Total Enrollment	Black	Spanish Surnamed Americans	American Indian & Oriental	Other
Lake Shore	4,273	1.3	0.8	0.4	97.5
Grand Island	4,314	1.5	0.1	0.5	97.9
Hamburg	6,112	0.1	0.1	---	99.7
Frontier	7,079	0.2	0.3	0.1	99.4
Holland	1,802	---	0.6	0.2	99.3
Lackawanna	5,473	16.3	5.2	0.1	78.5
Lancaster	6,980	0.4	---	0.2	99.4
Akron	2,045	0.6	---	6.7	92.7
North Collins	1,413	0.2	1.5	2.7	95.6
Orchard Park	5,557	0.5	0.2	0.1	99.2
Tonawanda	5,157	0.1	0.1	0.4	99.4
Kenmore	19,786	0.4	0.3	0.2	99.1
West Seneca	14,608	0.3	0.1	0.1	99.5
COUNTY TOTAL	215,613	13.0	1.1	0.6	85.3

(* - less than one percent)

SOURCE: DX 4; See Record, vol. X, at 68.

Order Clarifying the Court's April 30, 1976 Amended Order.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, et al.

Plaintiffs

-vs- Civ-1972-325

EWALD P. NYQUIST, et al.

Defendants

In this court's April 30, 1976 decision in this case, which allowed the plaintiffs to amend their complaint to include individual members of the Board of Education and State Board of Regents, I quoted the recent Second Circuit opinion in Monell v. Department of Social Services, ____ F.2d ____ (2d Cir. 1976), slip opinion at 2420:

> There is no doubt that municipal and state officials, sued in their official capacities, are "persons" within the meaning of §1983 when they are sued for injunctive or declaratory relief.

I also stated that the "[p]laintiffs have stipulated that they do not, and will not, seek attorneys fees from the defendants as private citizens in their individual capacities." Furthermore, I explained that had the individual Board members been named in the original complaint, the present defendants, in their official capacities, would automatically have been substituted under Federal Rule of Civil Procedure 25(d)(1).

At the May 19, 1976 hearing in this case, the court noted some confusion about its April 30 order granting leave to amend the complaint to add individual Board members. There was still apprehension that Board members could be held liable in their individual capacities. In addition, eight Board of Regents members have filed notice to appeal, seeking, among other things, to overturn this court's April 30 order allowing them to be named as defendants in their individual and official capacities.

The court now clarifies its April 30, 1976 amending order. The individual members of both the Board of Regents and the Board of Education were added to the lawsuit in their official capacities only.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: June 10, 1976

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Order Making Corrections in the Court's Decision.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, et al.

Plaintiffs

-vs- Civ-1972-325

EWALD P. NYQUIST, et al.

Defendants

Since this court's decision in this case was filed April 30, 1976, several minor errors have come to the court's attention. Pursuant to Federal Rule of Civil Procedure 60(a), the court makes the following corrections.

1. On page 128 of the decision, the words "Common Council" were inadvertently omitted from the last sentence of the first paragraph. The beginning of the sentence is now amended to read:

> The record in this case substantiates plaintiffs' claim that the Board of Education, the Superintendent of Schools, the Common Council, the Commissioner of Education and the Board of Regents . . . .

2. On page 152, the words "Common Council" were also omitted from the first sentence on that page.

The beginning of that sentence is amended to read:

> It is the finding of this court that the Board of Education, the Superintendent of Schools, the Common Council, the Commissioner of Education, and the Board of Regents . . ..

3. On page 3, the word "for" in the second sentence of the second paragraph should have read "forth." The sentence is amended to read:

> The question presented - whether or not the defendants intentionally committed segregative acts affecting the Buffalo public schools - is one that calls forth the strongest of emotions.

4. On page 55, the verb "was" on the fifth line of the first full paragraph is amended to "were."

5. On page 143, the direction "*See* map 5, *supra*" is amended to read "*See* map 3, *supra*."

6. In footnote 64, the citation to *Ex parte Anderson* is amended to read 125 N.Y.S.2d 701, 282 App. Div. 993, *leave to appeal denied*, 128 N.Y.S.2d 531, 283 App.Div. 748 (3rd Dept. 1954).

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: June 3, 1976

BEST COPY AVAILABLE

Notice of Motion of Defendants' Barell, Genrich, Griffith, Indelicato, Jovanovich, Kendall, Klein and Yavner for Reconsideration and Modification of the Court's Decisions (2) Dated April 30, 1976.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
-----------------------------x

GEORGE ARTHUR, et al.,

Plaintiffs, Civ-1 72-325

-against-

NOTICE OF MOTION

EWALD F. NYQUIST, et al.,

Defendants.

-----------------------------x

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of David Blasband, sworn to June 15, 1976, defendants Martin C. Barell, Willard A. Genrich, Emlyn I. Griffith, Joseph C. Indelicato, William Jovanovich, Mary Alice Kendall, Genevieve S. Klein and Louis E. Yavner, will move this Honorable Court on June 21, 1976 at 2 P.M. at the Federal Courthouse, Buffalo, New York, to reconsider and modify its two decisions dated April 30, 1976 in the following respects:

1. To hold that neither the Board of Regents nor any individual Regent was responsible in any manner, either by affirmative act or omission, for such segregation as may exist in the Buffalo school system; and

2. To hold that the individual Regents should not have been added as parties-defendant to this proceeding; and

3. To dismiss the proceeding as to movants;

upon the grounds, as set forth more fully in said defendants' accompany memorandum of law, that the Court has overlooked certain matters of fact and law.

Dated: New York, N. Y.
June 15, 1976

Respectfully submitted,

LINDEN AND DEUTSCH

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Affidavit of David Blasband in Support of Motion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
------------------------------x

GEORGE ARTHUR, et al.,

Plaintiffs,

-against-

EWALD F. NYQUIST, et al.,

Defendants.

------------------------------x

Civ-1972-325

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DAVID BLASBAND, being duly sworn, deposes and says:

1. I am a member of the firm of Linden and Deutsch, attorneys for movants herein, and submit this affidavit in support of the within motion for reconsideration and modification of the two decisions of this Honorable Court dated April 30, 1976.

2. The grounds for the instant motion are fully set forth in the accompanying brief submitted on behalf of movants, eight members of the Board of Regents of the University of the State of New York who assumed their official capacities on the following dates:

Hon. Martin C. Barell - April 1, 1976
Hon. Willard A. Genrich - April 1, 1973
Hon. Emlyn I. Griffith - May 23, 1973
Hon. Joseph C. Indelicato - February 4, 1964
Hon. William Jovanovich - April 1, 1974
Hon. Mary Alice Kendall - March 11, 1975
Hon. Genevieve S. Klein - April 1, 1974
Hon. Louis E. Yavner - April 1, 1975

Affidavit of David Blasband in Support of Motion.

3. At page 6 of the accompanying brief, reference is made to an opinion submitted by Former New York State Supreme Court Justice Harold T. Hogan defining the authority and responsibility of the Office of Commissioner of Education as contrasted with that of the Board of Regents. The Board of Regents requested that Justice Hogan prepare an opinion in March 1976, prior to the Court's decision on the merits in this suit. A copy of Justice Hogan's Report which he rendered on May 8, 1976 is annexed hereto as Exhibit "A".

4. Reference is also made in the accompanying brief to policy statements issued by the Board of Regents with respect to integration. Copies of those policy statements which were issued prior to and subsequent to the trial of this action, will be submitted to the Court and attorneys for the parties prior to the return date of this motion. Your deponent understands that the policy statements issued subsequent to the trial of this action, as well as the Report of Mr. Justice Hogan referred to above, were not part of the trial evidence. They are being submitted to the Court both for its information, and as examples of materials which movants herein would have requested the Court to consider if an opportunity had been accorded to them in the Court's decision of April 30, 1976 to offer a defense to this action as parties-defendant. Such evidence would have been in addition to oral testimony by the individual Regents as well as cross-examination by the counsel with respect to testimony by witnesses concerning the Regents actions or alleged inactions in

this matter. For example, reference was made during the course of the trial to unofficial efforts made by Regent Genrich to bring together the Office of the Commissioner of Education and the Buffalo School Board to work out a plan of integration. The record with respect to these efforts would have been more fully developed through oral testimony if the proceeding had been reopened.

5. For the reasons set forth in the accompanying brief, it is respectfully submitted that the within motion be granted in its entirety.

David Blasband
David Blasband

Sworn to before me this
15th day of June, 1976.

Isadore Rabinowitz

ISADORE RABINOWITZ
NOTARY PUBLIC, [illegible] NEW YORK
[illegible]

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

Journal of Regents Meeting, January 27-28, 1960

REGENTS STATEMENT ON INTERCULTURAL RELATIONS IN EDUCATION

After the Supreme Court decision of May 1954, we have all been a part in reevaluating the role of education in a democracy. It was of greatest significance that the Court in its historic decision stated:

> "We must consider public education in the light of its full development and its present place in American life throughout the nation. . . .
>
> "Today, education is perhaps the most important function of state and local governments . . . it is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. . . .
>
> ". . . to separate (them) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . ."

The State of New York has long held the principle that equal educational opportunity for all children, without regard to differences in economic, national, religious or racial background, is a manifestation of the vitality of our American democratic society and is essential to its continuation. This fundamental educational principle has long since been written into Education Law and policy. Subsequent events have repeatedly given it moral reaffirmation. Nevertheless, all citizens have the responsibility to reexamine the schools within their local systems in order to determine whether they conform to this standard so clearly seen to be the right of every child.

Modern psychological knowledge indicates that schools enrolling students largely of homogeneous, ethnic origin, may damage the personality of minority group children. Such schools decrease their motivation and thus impair the ability to learn. Public education in such a setting is socially unrealistic, blocks the attainment of the goals of democratic education and is wasteful of manpower and talent, whether this situation occurs by law or by fact.

In seeking to provide effective education for all the children of this State, boards of education are faced with many obstacles in the form of complex social and community problems. Among them is the existence of residential segregation which leads to schools with students predominantly of one race on the elementary and high school levels.

In spite of these and other difficulties, the Regents are determined to accept this challenge facing our schools today. We charge the Regents Advisory Council on Intercultural Relations in Education, working in close cooperation with the State Education Department, to assist in seeking

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

solutions to the educational aspects of the problem. The council's recommendations for action, based on systematic and objective study, will be reported to the Regents in due course.

We recognize that we who have been given the responsibility for the education of the children and youth in our State can deal directly with only these educational aspects. There are larger community problems which influence the quality of education in, and the ethnic composition of our schools. So long as these larger social problems remain unsolved, it will be difficult to solve some of the basic and related educational situations. For this reason, therefore, we call upon all our citizens and their agencies of government and their civic organizations to take concrete steps to provide the social climate which will make it possible for us to increase the effectiveness of education. Only with this cooperation will we be able to provide that type of democratic education which will enable all children to contribute their understanding, knowledge and skills to increase the greatness of our State and our Nation.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

A Position Paper . . .
. . . No. 1 of a series

URBAN EDUCATION

A Statement of Policy
and Proposed Action
by the
NEW YORK STATE
BOARD OF REGENTS

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
ALBANY
November 1967

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

THE UNIVERSITY OF THE STATE OF NEW YORK

Regents of the University *(with years when terms expire)*

1968	Edgar W. Couper, A.B., LL.D., L.H.D., *Chancellor*	Binghamton
1970	Everett J. Penny, B.C.S., D.C.S., *Vice Chancellor*	White Plains
1978	Alexander J. Allan, Jr., LL.D., Litt.D.	Troy
1973	Charles W. Millard, Jr., A.B., LL.D.	Buffalo
1972	Carl H. Pforzheimer, Jr., A.B., M.B.A., D.C.S.	Purchase
1975	Edward M. M. Warburg, B.S., L.H.D.	New York
1969	Joseph W. McGovern, A.B., LL.B., L.H.D., LL.D.	New York
1977	Joseph T. King, A.B., LL.B.	Queens
1974	Joseph C. Indelicato, M.D.	Brooklyn
1976	Mrs. Helen B. Power, A.B., Litt.D.	Rochester
1979	Francis W. McGinley, B.S., LL.B.	Glens Falls
1981	George D. Weinstein, LL.B.	Hempstead
1980	Max J. Rubin, LL.B., L.H.D.	New York
1971	Kenneth B. Clark, A.B., M.S., Ph.D.	Hastings on Hudson
1982	Stephen K. Bailey, A.B., B.A., M.A., Ph.D., LL.D.	Syracuse

President of the University and Commissioner of Education
James E. Allen, Jr.

Deputy Commissioner of Education
Ewald B. Nyquist

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

FOREWORD

To assist in planning for the future development of education in New York State, the Board of Regents is preparing a series of position papers on major educational issues confronting the State. The following presentation, the first in this series, deals with the special needs and problems of education in our heavily populated urban areas. It not only draws the problems into sharp focus, but it proposes a course of action and contains recommendations for proposed legislation to be considered by the Legislature in 1968.

In considering their recommendations, the Regents and the State Education Department have had the benefit of the Governor's publicly announced 21-point program for dealing with the "urban crisis" in New York State. We believe our recommendations are responsive to his expressed concern and consistent with his program for broad State action.

Education in urban areas is an urgent issue which vitally concerns all the citizens of our State, no matter where they live. It is hoped, therefore, that the Regents program will receive favorable consideration and support by the Governor, the Legislature, and the public at large.

James E. Allen Jr.
Commissioner of Education

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

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Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

INTRODUCTION

The major problem of education in New York State today lies in our cities. The recent series of riots, boycotts and strikes has forced us to realize that no excuse can justify delay of a concerted effort to reform urban education. No task is more difficult or essential; no issue forces us more seriously to adjust traditional policy and practice to new thought and action.

We must understand these six factors of the problem:

—The great size of population in the cities has resulted in systems of central educational control that are remote and too complex to be responsive to community and neighborhood needs.

—The preceding point is especially compounded today because the population turnover in the last two decades has resulted in an urban concentration of minority population groups which are blocked by barriers of race and language from full participation in the social, political, economic and educational life of the cities. This condition has spurred growing distrust for the established order and institutions of education.

—The proportion of non-white population in the cities, and especially in the public schools of the cities, is increasing. Racial isolation in the schools is also increasing. Continuation or expansion of this isolation will perpetuate under-achievement for large portions of the non-white population and will impair the development of sound attitudes and understanding among the races.

—Cities have disproportionately high concentration of lower class population, both white and non-white. Education of persons in this class *in isolation* yields inferior results. To have equal opportunity, they must be educated in schools with predominantly middle-class populations. In some city school districts, the proportion of middle-class population in the public schools has declined to the extent that achieving desirable pupil assignment within the city is extremely difficult, if not impossible.

—The increasing use of violence as a means toward political ends portends the terrifying prospect that ghetto populations may believe firebombs, bricks, and gunshot are the only message which the majority will heed. There are in the ghettos forces that will disintegrate society and fracture all rapport among the races unless they can be redirected.

—The loss of economic strength of the cities, heavy demands for safety, welfare and other city services on the tax dollar — the " municipal over-burden " — and restrictions of State legalities constitute a debilitating burden on the cities' capacity to finance necessary educational services.

The complexity of these factors and the magnitude of the problem leads to this statement of the Regents position on urban education.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

POSITION OF THE REGENTS

The Regents now direct the State Education Department to develop a strategy for the revitalization of urban school systems. The central task is to reorganize and rebuild the urban school systems of the State in accordance with master plans to be prepared for each major city and its metropolitan area. In the same way that the State focused its resources and public attention upon the problems of rural education in the 1930's, it is now imperative to direct our resources to the improvement of urban education.

We must candidly state at the outset that a comparison of steps we might like to take and the steps that we can take may seem incompatible. Our objective is to place our educational institutions in the vanguard of developing and sustaining equal opportunity for all in a racially and socially integrated society. The means toward that goal will often appear inconsistent. For example, in one case in order to enable students from varied backgrounds to learn together, the boundaries of school administrative units need to be expanded to serve greater population. In another case, in order to strengthen parent interest in education and the sense of community and neighborhood participation in education, boundaries might have to be contracted. In some cases, both are necessary and the solutions self-contradictory.

We struggle with this and other paradoxes posed by alternative paths toward the goal. We plead for a tolerance of flexible and alternative means and suggest that the steps to be taken will vary from one district or part of the State to another according to the dimension of the problem. We must have a vision of an optimal solution, but we must not lose sight of the critical need to improve the education of all students in their present circumstance.

The Regents support the following principles as basic to constructive action:

Principles for Action Program:

> *Education is a State Function.* Primary responsibility for the creation and maintenance of an environment which is conducive to urban and metropolitan school development rests with the State. While acknowledging realistic and appropriate Federal responsibilities on the one hand and different but equally important local responsibilities and concerns on the other, it is the position of the Regents that the State must take the lead in shaping and preserving the balance of the multi-level efforts.
>
> *Intergovernmental Planning and Coordination.* The Regents submit that the efforts of the several departments of State gov-

ernment concerned with urban problems need to be related more effectively to each other horizontally and to other agencies of government vertically, Federal and local. Unilateral action by any agency of State government in dealing with the problems of large cities or metropolitan areas is likely to be unfruitful. The Regents pledge their support to an acceleration in intergovernmental planning and coordination.

In the development of the following program for urban education, the Regents propose close coordination at the three major governmental levels. Specifically, this means working at the local level with education agencies, anti-poverty agencies, health and welfare offices and offices of general government, with colleges and universities in the cities, especially The City University of New York; at the State level working especially with the Office of Planning Coordination, the Departments of Health, Labor and Social Services and the State University; at the Federal level with the Department of Housing and Urban Development (especially the Model Cities Program and the Neighborhood Services Center Program), with the Federal Executive Boards of the Civil Service Commission, with the Office of Economic Opportunity, and with the several offices of the Department of Health, Education and Welfare.

Metropolitan Planning. The Regents believe that planning for improved urban education must not be bound by the limits of current city or school district boundaries. The Regents suggest, indeed, that many of the problems of urban life may be inherent in political structures which have become obsolete, and that solutions to emerging problems may be found through the creation of new administrative and fiscal arrangements for metropolitan educational services. Of basic importance for providing flexibility to realize such arrangements is the modification of present constitutional debt and tax limitations on the major cities.

The Quality of Education in the Cities. Urban schools must offer a quality of program to all city children equivalent to that available in neighboring suburbs. The schools must be of such calibre to encourage middle-class families to remain in the cities or be attracted to them. The improvement of city school quality is thus a part of the Regents overall objective to eliminate racial and social segregation from the schools.

These principles set our sights on broad objectives and long-range plans for the cities and their metropolitan areas. At a later point, we will make a specific proposal to begin developing such plans. Other action of the Regents and the State Education Department need not, however, wait upon completion of that process. Certain steps must be taken now to implement the best short-range remedies we can develop for the problem described earlier and in anticipation of

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

long-range plans to come. These steps should be directed by the following guidelines.

Guidelines for Action Programs:

A specific program for immediate action will be proposed later in this statement. This program is derived from the foregoing principles and the following seven guidelines.

—The overreaching purpose of the State program is to assist local authorities in providing all persons in urban areas with full equality of educational opportunity in an integrated social and racial context.

—Strong emphasis must be placed upon neighborhood or community participation within the cities in the governance of educational programs.

—New expenditures should be directed especially toward expanding projects that have demonstrated successful performance.

—Programs for education must be painstakingly coordinated with the services of other public and private agencies — local, State and Federal — so that the children and adults participate as complete beings who have inter-related needs of health, welfare, employment, housing, recreation and education.

—Educational projects for the educationally poor must have sufficient concentration of resources to assure that substantial improvements in performance will be attained. Projects must be designed so that the combination of efforts will produce the " critical mass " effect necessary to generate results that several component parts could not produce separately.

—Technical and professional personnel of the communities served, of colleges and universities and of private industries, institutions and associations must be recruited and their talents joined with those of public officials in assistance to local and neighborhood agencies for planning and implementation of education projects. The resources of all colleges and universities, wherever located, must be marshalled especially for direct assistance in operating projects and training personnel.

—The most pressing problem with respect to improving urban education is the preparation of personnel to serve the educationally poor. Ways must be found to direct the efforts of a large share of our most talented personnel already in education to meeting their needs. Of great importance, in addition, is the identification and training of indigenous talent to serve in professional and paraprofessional roles in their own or similar communities. These persons know the problems of the disadvantaged and have the background helpful for engaging them in learning. This is a largely-neglected source of talent which must be developed in order that the overall demand for qualified personnel can be satisfied.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

Present and New Program Directions:

The Regents' and the State Education Department's current efforts for education in the urban areas include a variety of advisory, cooperative and financial aids. They are not described in detail here, but brief reference will serve to set the perspective.

Of basic importance is the provision of State financial aid for the elementary and secondary schools. Because of increases in school costs throughout the State, the Regents recommend this year an overall increase in State aid by raising the ceiling, thereby providing additional financial aid to the cities as well as all other areas. (This recommendation will be described in greater detail in forthcoming legislative proposals on State Financial Aid.) The Department has also an on-going program for direct assistance to local school districts for planning and implementing integration projects which is of particular importance to the urban areas. The Regents recommend an increase in expenditures for this program next year. (This recommendation is described in detail in a forthcoming statement on Integration.) There are, furthermore, a variety of special or categorical aids that supplement these programs. These aids are described in a publication of the State Education Department, soon to be released, *Programs for Progress.*

The State has done much for the urban areas, but must do more in new directions. Therefore, the Regents propose *three new programs* for State action in assistance of urban education: first, a program for Quality Incentive Grants for Urban Education, to provide coordinated and concentrated educational services in the cities, especially for the most disadvantaged youth and adults; second, establishment of a new program for recruitment and training of teaching personnel for the cities, including The Urban Teacher Corps; third, a program for planning grants and demonstration projects for the large urban areas.

QUALITY INCENTIVE GRANTS FOR URBAN EDUCATION

The major new direction proposed is a program for Quality Incentive Grants for Urban Education. This program will provide coordinated and concentrated educational services to youth and adults in those parts of the State where there are high concentrations of population with low educational attainment. The Regents recommend that $100,000,000 be appropriated for such grants in 1968-69 to be allotted among selected school districts of the State, according to the extent of their need as determined by a formula based on the number of pupils with reading competence below average, the number of ADC children or some similar measurement device.

One-half of the funds appropriated are to be used by the local districts as they determine their particular needs for improving the quality of education throughout the district. The remaining funds, approximately $50,000,000, are to be used by the local districts in programs for the educationally poor in accord with the district's "plan for quality incentive programs." This plan will be developed cooperatively by the district and the State Education Department, and be subject to Department approval. High priority in the development of the plan will be placed upon the degree to which various Federal, State and local programs are coordinated to provide concentrated service to the participants in the target community area.

Approximately one-half of each district's funds under the "plan for quality incentive programs" shall be used for projects related to development and operation of "community education centers." The remaining part shall be used primarily for operation of programs directly related to the regular elementary and secondary school program. These two major uses are described further.

Community Education Centers ($25,000,000 for 1968-69)

Community education centers are proposed to establish focal points for providing educational and other related services in disadvantaged areas within the school districts. These centers will coordinate and plan for the community, as well as operate certain programs. The program of each center, to be determined in large part by community representatives, will provide a means by which needs of employment, health, recreation, counseling, family services and education *for all age groups of the community* might be met either through direct aid at the center or by coordinated referral. Each center will provide projects closely related and supplementary to regular elementary and secondary schooling; projects for youths; projects aiding those enrolled in higher education; and projects for adults. Through such centers, the wide ranges of local, State and Federal government programs and private programs can be coordinated *from the point of view of the participants,* and new projects can be developed for their specific interests.

Community education centers would initially be established in existing school structures or other community facilities. All steps would be taken to assure maximum use of existing resources, public or private, for operation of various projects. Centers should be in operation throughout the year and perhaps around the clock — especially after school, evenings, weekends and summers.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

Community education center plans will be developed with the participation of center boards of parents and community leaders, local and State officials. Each center plan will become part of the district plan for quality incentive grants. Funds for operation of projects under approved center plans will be granted through the local education agency to the center.

The task in the coming year is to establish a number of community education centers with appropriate boards of parents and community leaders to participate in their policy planning. At the outset, each board must have staff and funds to develop a profile of the community's educational needs. To assist these boards in determining working procedures and preparing center plans, technical assistance teams of public officials and private agencies must be recruited and supported. In many cases, centers can be developed in time for handling the operation of some programs within the first year.

A wide variety of educational as well as other projects might be undertaken by the centers. Education projects might range from adult literacy training to development of residential educational projects for children. Illustrations of projects that might be undertaken are these: for pre-school children — nursery school projects; for in-school youth — student tutoring, after-school and summer classes supplementing regular school work, pupil personnel services in health, nutrition; for adults — training for child care, job retraining, recreation and hobby programs; for all persons in the community — learning diagnostic services, neighborhood library centers, projects in the performing arts.

Each community will have its own priorities. The great advantage of the center will be to provide a focal point at which these priorities can be set and the several projects serving all age groups of the community coordinated and concentrated.

Other Quality Incentive Projects ($25,0000,000 for 1968-69)

The remaining half of each district plan shall include projects determined to be of greatest promise for promoting quality of education for disadvantaged children at the pre-kindergarten, elementary and secondary school levels. Such projects would not necessarily be operated through the community education centers, but they might be.

A variety of projects would be funded according to the district's needs. Certain projects now operated with State funds would be incorporated into this program for quality incentive grants and continuation and expansion of these projects would have high priorty in the plans. The present State programs to be incorporated are the Pre-kindergarten Program, Project ABLE, Project STEP and Adult Basic Education. Projects for summer residential education camps and campuses and work-study for students in occupational education would also have high priority. (A description of these several types of projects is found in Appendix A of this paper.) Other projects suitable to a particular community would be eligible, of course.

The overall proposal for Quality Incentive Grants for Urban Education, including the grants to be used in any part of a district and those specifically to aid the educationally poor through Community Education Centers and other projects, therefore, would provide a means to place State aid at the points of greatest educational need and to provide for coordinated local, State and Federal planning to assure the most effective use of the funds.

URBAN TEACHER RECRUITMENT AND TRAINING

New York Urban Teacher Corps

The second proposal would establish a new program to recruit, train and place teachers and auxiliary personnel in disadvantaged urban areas. This program is not intended to replace current practices in teacher training but to supplement them, giving high priority to seeking out personnel indigenous to disadvantaged areas for teaching in such areas. These talents must be developed for three reasons: first, reinforcement of the drive for self-help in these areas; second, promotion of achievement in schools because common background and understandings will enhance rapport between learner and teacher; and third, stimulation of general community concern for community development through education. Initial effort in 1968–69 should reach at least 1,500 persons. In addition to providing internships and pre-internships for prospective teachers, this program would provide for training of mothers and other local adults to assist in paraprofessional roles from pre-kindergarten through high school. The Regents recommend that $9,000,000 be appropriated for 1968–69 to establish this Urban Teacher Corps. The program will have three emphases:

Internships for College Graduates

Recent college graduates, principally those without teacher training, will be recruited to attend intensive summer workshops in preparation for service in schools in the following fall. Some will prepare for partnership teaching arrangements developed under the State Education Department's Teachers Reserve Program. The training program will be run by a university; the instructional personnel will include master teachers from the schools where the interns will serve. The master teachers will also take part in a concurrent summer workshop to improve supervisory skills. Beginning interns will both teach and study in their first year. Master teachers will supervise four to five interns and will have no direct classroom responsibilities.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

Pre-Internship for College Students

During the early undergraduate years, college students would be introduced to an understanding of teaching through such activities as tutoring individual students and helping in formal classroom settings. In their junior and senior years, students preparing to teach in slum schools would have paid pre-internships under the supervision of cooperating teachers trained for the task. These students would be placed in teaching assignments after graduation.

Community Personnel in Auxiliary Teaching Services

Many persons in disadvantaged areas who are unemployed or under-employed can provide paraprofessional assistance in the schools if identified and trained. Provisions will be made to recruit these persons from depressed urban areas, give them initial paraprofessional training and then assist those qualified to move up the career ladder to full professional service while engaged in the schools as auxiliary personnel.

Language Development Training for Teachers

Also of high priority in teacher training is the need to prepare more persons with the language skills that will equip them to work effectively with disadvantaged children. The Regents recommend a program to provide assistance to local education agencies and to institutions of higher education to train teachers in language development. Large cities in the State of New York have great numbers of children whose home language is either not English or else is such a distinct dialect of English that, in effect, it is a second language to the teacher. These children very often are found in the slum or ghetto areas of the cities, and therefore suffer double deprivation in overcoming both the handicaps of poverty and the handicaps of a teacher's language foreign to their understanding. The program would provide grants to local education agencies and/or institutions of higher education to provide special materials for these children and to train teachers, both pre-service and in-service, to master techniques in teaching children of other linguistic backgrounds.

Grants could be made to expand present programs which are operating as demonstration or pilot programs or to design and implement new programs. The Regents recommend an appropriation of $1,000,000 in 1968-69 for this purpose.

To meet the critical need for more teachers and better trained teachers in the urban areas, then, the Regents rcommend the establishment of a New York Urban Teacher Corps and a program for Language Development Training for Teachers at a total estimated cost of $10,000,000 for 1968-69.

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Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

PLANNING GRANTS, DEMONSTRATION PROJECTS AND EVALUATION

Simultaneous with the initiation of new programs for teacher recruitment and training and quality incentive grants for urban education, the Regents propose appropriation of some $2,000,000 in 1968–69 for planning grants and demonstration projects. It is essential that, in addition to immediate programs, the long-range direction for State and local action be developed. The Regents propose, therefore, to begin next year to finance development of a master plan for education in each of the major metropolitan areas of the State. These plans will be developed cooperatively by the officials of the school districts and of the State, with the help of qualified private or public planning agencies.

In addition to these planning projects, demonstration projects on structural arrangements for administering education should also be launched. These include projects for cooperative arrangements among city and suburban school systems and projects for new policy and administrative arrangements within large districts which would decentralize control either by creating satellite school boards or, perhaps, special purpose districts within a city. For these purposes, grants to local school districts will be made.

The kind of planning, demonstration projects and evaluation programs described here will require a highly sophisticated and systematic effort. The burden rests in large part on the State. To meet its responsibilities, the resources of the State Education Department must be strengthened so that it can effectively marshal the forces of the Federal government, the "new education industries," the academics, and community leaders to plan what must be achieved and how best it can be accomplished in urban education.

We must be frank to state that new efforts will be of a pilot and limited nature — limited in the numbers immediately reached because of a lack of resources and limited by our ignorance of just which operational steps will have the most impact. Because of these limits, great stock must be placed in very careful evaluation of these ventures. Each new program must, in turn, be considered as a potential model for widespread future funding as well as a contribution in itself. We must be as careful in testing what is done as in doing it. There will be little evidence of instant success.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

SUMMATION

The cities have high concentrations of children who are the most difficult and costliest to educate. Evidence is all too abundant that they are not being adequately educated and that major reforms of city education are in order. In accord with State responsibilities, the Regents recommend that the Governor and Legislature approve three major steps toward improving urban education:

1. The development of long-range plans for education for each large city and its metropolitan area *and* the support of demonstration projects for new structural arrangements for education within cities and between cities and suburbs. Estimated cost for 1968–69, 2,000,000.
2. Initiation of a program of Quality Incentive Grants for Urban Education to provide coordinated and concentrated educational projects in urban districts. These projects would especially help the educationally poor. Estimated cost for 1968–69, $100,000,000.
3. Initiation of a New York Urban Teacher Corps for recruiting and training personnel, especially those indigenous to disadvantaged areas, for teaching in such areas. Estimated cost in 1968–69, approximately $10,000,000.

The Regnts hereby approve a new direction of the resources of the State Education Department to solving the problems of urban education. Every aspect of the urban school system, from teacher recruitment and preparation to parent participation and school-community relations, must be open to a tradition-free consideration of the relevance of present policies and practices to today's circumstances. No area of our responsibility will receive greater attention than providing equal opportunity and increasing educational quality for all people of our cities.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

URBAN EDUCATION

APPENDIX A

Examples of Continuing and New Programs To Be Funded Through Quality Incentive Grants to Urban Areas

Pre-Kindergarten Program

The Present Status — The State budget for 1966–67 included a $5,000,000 appropriation to the State Education Department for grants to enable local school boards to demonstrate quality pre-kindergarten programs for three- and four-year-old children in disadvantaged areas. The appropriation was also to enable the State Education Department to study the effectiveness of such programs and the problems connected with educating young children and with parent involvement in these programs. From the beginning, it was planned that the programs would have stronger leadership from the Department and that, in addition to the pilot programs through the State, a few Demonstration Centers would be selected in strategic areas of the State to provide exemplary programs for school staff members to observe and emulate.

By the end of the first year, in June 1967, thirty-nine school districts were conducting pre-kindergartens for 12,651 children in disadvantaged areas, including 10,000 in New York City which received Federal as well as State funds. The thirty-nine school districts included only three of the Big Six cities. The other three did not apply to the Commissioner of Education for a pre-kindergarten program principally because of the lack of funds for the city share of the program. In certain cases, these large cities had pre-kindergarten programs funded by Head Start or the Elementary and Secondary Education Act under more liberal financial circumstances.

Following another appropriation of $5,000,000 for 1967–68, by September 1, 1967, forty school districts had either received approval to operate pre-kindergartens during 1967–68 for 12,701 children at a total local and State cost of $6,242,000. Thirty-six of these are continuing programs. Some of the forty school districts have been able to apply only because they are Demonstration Centers where funding is 100 percent for budget items which apply to demonstration aspects. There have been no new applications from the Big Six cities.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

Funds and Legislation Needed — If any of the Bix Six cities and other urban areas not now in the program are to open the doors to three- and four-year-old children in disadvantaged areas, it is essential that funds for this program be increased. In addition, State funds should be made available to develop special programs to follow those children who have had pre-kindergarten through kindergarten and first grade. Programs similar to the limited efforts initiated by the U.S. Office of Education for pilot kindergarten follow-throughs in Rochester and New York City should be established. An estimated $10,000,000 is needed for 1968–69 for expansion of the pre-kindergarten program and for a State funded follow-through in kindergarten and first grade.

Student Aid for the Academically Talented

Project ABLE provides demonstration projects to develop, test and disseminate practices for identifying and giving special help for capable pupils from culturally disadvantaged or low socio-economic backgrounds. Twenty-nine school districts are participating in 1967–68 with local funds which at least match the allocated State funds. About 14,000 pupils are involved.

State funds for 1967–68 amount to $500,000. The legislation should be amended to substitute a provision for flexibility of matching for the present 50–50 matching. Under present conditions, many school districts, especially the larger cities, find it impossible to contribute one-half of the cost of what might be a significant ABLE project and, therefore, receive no State funds. With flexibility in matching so that new districts could establish ABLE projects and with expansion of existing projects, the estimated cost of ABLE in 1968–69 would be $3,000,000.

SEEK Programs — Existing programs identify talented but educationally disadvantaged youngsters and encourage them to attend college. The projects now in New York City and Buffalo operated by City University and State University should be continued and expanded, and, in addition, new programs should be funded in other urban areas. During 1968–69, first priority should be given to the establishment of SEEK Programs through the State Education Department to be located in Rochester, Syracuse and Albany. Also during 1968–69, plans should be developed to establish SEEK Programs in Newburgh-Poughkeepsie-Kingston, Suffolk County and Utica. The New York City SEEK Program was originally funded for $1,000,000; Buffalo SEEK was funded for $500,000. The latter sum is a minimal amount which can accommodate approximately

250 students for the first year and a small number of additional students thereafter. The three new programs should initially be funded for $500,000 per year so that the total needed for 1968–69 is $3,000,000, of which $1,500,000 would be in the State Education Department budget.

School-to-Employment Program (STEP)

The School-to-Employment Program (STEP) is a part-time school, part-time work program for potential dropouts of at least 15 years of age. Its two goals are to assist potential dropouts to remain in school and graduate, or if they do decide to leave, to assist them to find satisfactory full-time employment.

In 1967–68, thirty-four school districts are participating, with some 1,200 pupils in more than 50 STEP units. The program has proven very effective in getting to and providing for the needs of a hard-core, potentially unemployable group. It has proven to be a relatively short-term, inexpensive program of reorientation to school and work.

The State funds allotted for 1967–68 amount to $500,000. In 1968–69, the legislation should be amended to delete the 50–50 matching requirement and to substitute a provision for flexibility of matching. Under present conditions, many school districts, especially the larger cities, find it impossible to contribute one-half of the cost of what might be a significant STEP project. With this flexibility in matching so that new districts could establish projects and with the addition of some new approaches such as the development of summer programs and more emphasis on vocational guidance — the estimated cost for STEP projects in 1968–69 is $5,000,000.

Summer Educational Camps and Campuses for Urban Youth

Through this proposal, the State of New York would make available summer residential educational camps and campuses for urban youth. Youngsters from the urban areas would be brought together with those from suburban or rural areas for combined recreational and educational experiences. Existing facilities, especially on college campuses, would be used for this program.

A residential camp or campus could provide numerous unprecedented opportunities for urban students to discover and learn many subjects such as astronomy, geology, horticulture and agriculture in realistic, interesting, unique and memorable ways. Elementary and advanced mathematics could be learned by activities such as marking athletic fields, computing distance hiked and measuring shadows of objects such as trees. Reading, writing, spelling and other basic educational subjects are implicit and explicit considerations in all of the activities enumerated, all to take place in an integrated environment apart from the pressures of the ghettos.

To date, some projects such as the *Programs To Excite Potential* have made very effective use of campus facilities and teaching personnel during summer months. For next summer, some $5,000,000 should be used to make such camps available for urban youth throughout the State.

Work-Study for Students in Occupational Education

In fiscal 1965–66, the first full year of operation, some $3,000,000 in stipends, principally from Federal funds, were paid to vocational students for part-time jobs in public agencies. The amount accommodated approximately 76 percent of the funds requested by local education agencies. At the moment, Federal funding of this program is in doubt. If Federal funds are available, they will probably not exceed $827,000. In that case, a State appropriation of at least $2,000,000 would approach meeting three-fourths of the need. Without Federal funding, a State funding of nearly $3,000,000 would be necessary, yet be considerably less than local requests. For 1968–69, the estimate of State assistance is $2,000,000.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

1784

A Position Paper . . .
. . . No. 3 of a series

INTEGRATION
and the
SCHOOLS

A Statement of Policy
and Recommendations
by the
REGENTS OF THE
UNIVERSITY OF THE
STATE OF NEW YORK

Reprinted 1973

THE STATE EDUCATION DEPARTMENT
Albany
January 1968

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

THE UNIVERSITY OF THE STATE OF NEW YORK

Regents of the University *(with years when terms expire)*

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1979	Francis W. McGinley, B.S., J.D., LL.D.	Glens Falls
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1983	Harold E. Newcomb, B.A.	Owego
1981	Theodore M. Black, A.B., Litt.D.	Sands Point

President of the University and Commissioner of Education
Ewald B. Nyquist

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

FOREWORD

A fundamental responsibility of government is to establish and maintain from generation to generation the broad conditions under which the education of free men may be carried on. State government which is legally responsible for the provision of educational opportunity has a special obligation in this regard.

Equality of educational opportunity is being denied to large numbers of boys and girls — white as well as Negro and other minority group children — because of racially segregated schools. This condition must not be tolerated in a democratic society. Effective solutions must be found even if they require major changes in the established assumptions, organizations and boundaries that are a part of our present educational system.

This statement of policy by the Regents, the third of a series, is a reaffirmation of their determination to see that segregation in education is eliminated, and that the conditions under which each individual may grow in self-respect, respect for others, and in the attainment of his full potential, shall exist everywhere in the State.

I join the Regents in calling upon school board members, administrators, teachers, and all other citizens to read this statement carefully, to be guided by the principles set forth, and to support its recommendations.

James E. Allen, Jr.
Commissioner of Education

January 1968

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

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COMMITMENT

The elimination of racial prejudice, discrimination, and injustice is the great moral and social imperative of our time.

The most powerful and effective means of achieving this objective is education.

Convinced of the truth of these statements, and aware of the extent of *de facto* segregation in the State's school system and of the growing racial tensions in many communities, the Regents unanimously adopted, in 1960, a statement of policy which declared:

> *Modern psychological knowledge indicates that schools enrolling students largely of homogenous ethnic origin may damage the personality of minority group children. Such schools decrease their motivation and thus impair the ability to learn. Public education in such a setting is socially unrealistic, blocks the attainment of the goals of democratic education and is wasteful of manpower and talent, whether this situation occurs by law or by fact . . . .*
>
> *The State of New York has long held the principle that equal educational opportunity for all children, without regard to differences in economic, national, religious, or racial background, is a manifestation of the vitality of our American democratic society and is essential to its continuation.*
>
> *All citizens (therefore) have the responsibility to reexamine the schools within their local systems in order to determine whether they conform to this standard so clearly seen to be the right of every child.*
>
> *. . . we (also) call upon all our citizens and their agencies of government and their civic organizations to take concrete steps to provide the social climate which will make it possible for us to increase the effectiveness of education. Only with this cooperation will we be able to provide that type of democratic education which will enable all children to contribute their understanding, knowledge, and skills to increase the greatness of our State and our Nation.*

In the intervening years, the Regents have repeatedly reaffirmed this statement of policy and have supported the efforts of the Commissioner of Education and his staff in implementing it.

Now, in 1968, we not only again reaffirm our earlier policy, but reinforce our commitment with a call for more determined, more powerful, more energetic pursuit of the objectives set forth therein.

THE NEED FOR STRONGER ACTION

Current conditions of unrest, frustration, and violence show all too clearly that not only is the struggle against racial prejudice and injustice far from over, but that a perilous weakening has taken place in the foundation of understanding and mutual respect upon which true social justice and human progress can be built.

These conditions also dramatically point up the importance of education as the strength of this foundation — education that brings children together to grow up in natural, genuine understanding, and mutual respect, that produces responsible citizenship, that fosters behavior based on moral and spiritual values, that prepares for jobs, that creates the competence and instills the confidence for managing one's own life — education that does not mirror society's ills but provides a demonstration of the practicality, the workability of the principles of democracy, thus leading the way and setting the pattern for society to follow.

Education should aim to free individuals and society from the burdens and impediments caused by ignorance and irrationality. Racism is a manifestation of such ignorance and irrationality, and is inimical to the welfare of individuals and society. The Regents and all others in positions of educational leadership cannot, therefore, be satisfied to wait for other social, business, and political forces to remedy social ills but must take the initiative in overcoming the ignorance which is at the root of those ills. If we do not, we fail in our most essential duty.

Progress made

If education is considered the most effective means of overcoming prejudice and injustice, the question then becomes how successfully is it being used.

The answer to this question is not simple, because the success of education must be measured against the increasing magnitude and complexities of the task.

In implementation of the Regents policy, the State Education Department has been active in assessing the extent of racial imbalance and the progress in correcting it, providing special consultation and assistance on integration to the school districts, preparing curriculum materials and teaching guides for use in the schools, conducting seminars and workshops for teachers, administrators, and laymen, and in securing funds to aid communities in eliminating racial segregation and in preparing for integration.

School desegregation is an accomplished fact in a number of school systems in New York State. Moving quietly, several communities have integrated their schools. Others, with perhaps more difficult situations, have carefully formulated their long-range plans and are moving with determination to implement them. In most cases, the problem has been approached calmly and dispassionately, with the emphasis on improving the quality of education for *all* pupils.

Problem grows

Despite the determination and significant accomplishments of many in education, the growth of the problem has outstripped the efforts to deal with it:

- Racial imbalance *within* school districts is increasing in both suburban and urban communities: racial census reports show that between 1961 and 1966, in the 41 school districts with the highest percentage of Negro pupils (exclusive of New York City), the number of elementary schools with more than 50 percent Negro pupils increased from 60 to 72; the number with more than 90 percent Negro pupils increased from 25 to 33.
- Racial isolation *among* school districts is also increasing. In this same period, the percentage of Negro pupils in one suburban district rose to 82 and in another, to 71. In three other districts, the percentage surpassed 50.

Obstacles to progress

Underlying all the difficulties which have hindered progress in school desegregation is the basic question of attitude. The attitude of resistance and misunderstanding which prevails among many is a strong factor which seriously affects attempts to achieve in all aspects of society the integration essential to justice for minority groups and equality of opportunity for all.

Experience of the past 7 years has shown that this negative attitude expresses itself in such ways as the persistent assumption that the elimination of segregation is dependent upon and must wait for the elimination of discriminatory conditions in housing, employment and social customs; a persistent, but mistaken, belief that our educational obligation can be met merely by equal or superior facilities and staff in segregated schools; an unwillingness to depart from traditional concepts of school structure and organization even when they are no longer appropriate for current needs and conditions; a growing distrust of the established order and institutions of education among minority-group "moderates" arising from disillusionment over the efforts and intent of the white majority; the endorsement of separatist solutions by militant advocates of segregation — both black and white.

While the public educational authorities at all levels bear direct responsibility for leadership and action in the elimination of segregation, the problem is also the responsibility of every citizen — of government officials, civic leaders, leaders of ethnic and racial groups. The existence of segregation not only creates individual and group injustice, abhorrent to all who believe in the dignity of man and the equality of opportunity implicit in a democracy, but it also poses a threat to the economic, social, and cultural health of the community, State, and Nation. It is, therefore, of utmost importance that a positive attitude shall prevail and that, both as a practical matter and as a moral obligation, prompt action be taken to correct the situation wherever it exists.

GUIDING PRINCIPLES

The basic precept of all educational endeavor is that equality of educational opportunity to develop the full potential of his capabilities is the right of every individual, and that it is the responsibility of the State to see that this equality of opportunity is provided for all. With this as an overriding objective, we believe the following principles should guide the development of policies and plans for eliminating racial segregation in education and for achieving an integrated school system:

1. Segregation of children on the basis of race is harmful. This fact is well stated in the 1967 report of a nationwide investigation by the United States Commission on Civil Rights, *Racial Isolation in the Public Schools* (p. 193, vol. 1):

> *The central truth which emerges from this report and from all of the Commission's investigations is simply this: Negro children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be.*
>
> *Negro children who attend predominantly Negro schools do not achieve as well as other children, Negro and white. Their aspirations are more restricted than those of other children and they do not have as much confidence that they can influence their own futures. When they become adults, they are less likely to participate in the mainstream of American society, and more likely to fear, dislike, and avoid white Americans. The conclusion drawn by the U.S. Supreme Court about the impact upon children of segregation compelled by law — that it "affects their hearts and minds in ways unlikely ever to be undone" — applies to segregation not compelled by law.*
>
> *The major source of the harm which racial isolation inflicts upon Negro children is not difficult to discover. It lies in the attitudes which such segregation generates in children and the effect these attitudes have upon motivation to learn and achievement. Negro children believe that their schools are stigmatized*

> *and regarded as inferior by the community as a whole. Their belief is shared by their parents and by their teachers.* And their belief is founded in fact. [*Emphasis supplied*]
>
> *Isolation of Negroes in the schools has a significance different from the meaning that religious or ethnic separation may have had for other minority groups because the history of Negroes in the United States has been different from the history of all other minority groups. Negroes in this country were first enslaved, later segregated by law, and now are segregated and discriminated against by a combination of governmental and private action. They do not reside today in ghettos as the result of an exercise of free choice and the attendance of their children in racially isolated schools is not an accident of fate wholly unconnected with deliberate segregation and other forms of discrimination. In the light of this history, the feelings of stigma generated in Negro children by attendance at racially isolated schools are realistic and cannot easily be overcome.*

This last point was also emphasized in the report of the Commissioner's Advisory Committee on Human Relations and Community Tensions which made a study of school segregation in New York City. *(Desegregating the Public Schools of New York City, May 12, 1964):*

> *Two reasons compel us to do our best to achieve well integrated schools. One is the moral imperative to assure all children true equality of opportunity. The other is the educational necessity to prepare every child to take his place in a world where no race may any longer live alone. The desegregation of the public schools . . . , therefore, means more than a better education for minority children. It means also a significant addition to the educative power of the schools for all children.*
>
> *To argue that no classroom can be good without a white child in it is inaccurate and cruel. But, it cannot be denied that a child who has learned from experience to understand and appreciate people of races other than his own has a sounder basis for both his education and his life.*

In forming their self-concepts, children are influenced by their experience of society's regard for the group with which they are identified. Thus, Negro children are likely to form lower opinions of themselves than their innate qualities warrant, and white children are likely to ascribe to themselves attributes that reflect more their favored position in our society than their own innate qualities. Only as the " rules of the game " become the same for all children can self-image be soundly formed. Children brought up in an all-white suburban community isolated from the realities of mixed racial, social, and economic situations can be disadvantaged children. Lacking experience with these very real problems they will be ill-equipped to deal with them when they leave school to enter a world of increasing diversity.

2. Educational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because it stands as a deterrent and handicap to the improvement of education for all. The corollary of the recognition of educational improvement for all children as the reason for integration is the necessity for quality in all schools everywhere. Desegregation and the prevention of further school segregation alike hinge on the creation everywhere of public schools so excellent that parents of all ethnic groups will enroll their children with confidence and pride. It is of utmost importance to find ways of correcting the deficiencies of schools not now producing the results they should.

3. The organizational and administrative arrangements of the school system exist for the purpose of facilitating the achievement of educational objectives. This is the criterion for the necessary continuing evaluation of existing arrangements in terms of their appropriateness for changing needs.

4. The " neighborhood " school offers important values, particularly in early education, but, when it becomes improperly exclusive in fact or in spirit, when it is viewed as being reserved for certain community groups, or when its effect is to create or continue a ghetto-type situation, it does not serve the purpose of democratic education, and corrective action is called for.

5. Decisions as to the particular means of eliminating racial segregation in education should, insofar as possible, be left to local action. There are many ways of dealing with the problem, and the local school officials, with their intimate knowledge of all factors of the local situation, are in a strategic position to devise solutions best suited to local needs. It is the State, however, that bears the ultimate responsibility for equalizing educational opportunities, and it is the obligation of the local school authorities to develop and implement plans in harmony with State policy. Where the solution to the problem is beyond the capability of the local school districts, or where a district fails or refuses to act, then the responsibility for corrective action is clearly and inescapably that of the State.

RECOMMENDATIONS

To apply the foregoing principles, the Regents recommend:

1. The establishment of school attendance areas that make possible, wherever feasible, a student body that represents a cross-section of the population of the entire school district.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

2. Action by school boards to develop and keep up to date a district plan for achieving and maintaining racially integrated schools. This plan should be developed with the assistance of a citizens' advisory committee broadly representative of the community. Appropriate and effective participation in the formation of educational policies is the right of every parent, and special effort should be made to provide opportunity for the involvement of minority-group parents in school affairs that affect their children.

3. A continuing emphasis upon racially comprehensive enrollment policies in nonpublic schools and an active effort on the part of public school authorities to bring nonpublic schools into the total community effort to eliminate racial segregation in education.

4. Initiative by school boards in seeking cooperation and assistance of other local agencies, public and private, in the development of plans and programs for integration. Although the schools bear the major responsibility for the provision of quality integrated education for all, other community agencies dealing with welfare, housing, transportation, health, and community development or planning also have vital responsibilities which are an essential part of the effort to achieve the ultimate goal.

5. The exploration by school boards of the possibilities of improving racial balance in their schools through cooperative action with neighboring districts.

6. The establishment and modification of school district boundaries so as to eliminate and avoid those which result in racial segregation.

7. The revision and simplification of legislation authorizing school district reorganization and the substantial increase of existing financial incentives for reorganization.

8. The modification of constitutional tax and debt limits on real property affecting city school districts in order to permit greater flexibility for the organization, administration, and financing of school systems which involve the city and its neighboring districts.

9. Increased State appropriations to stimulate school desegregation and to help school districts finance the additional costs incurred in carrying out programs for achieving integration.

10. An accelerated effort to have, in all our classrooms, textbooks and other teaching materials that reflect in their content and presentation the ethnic and cultural diversity of our world, and in particular, of American life. The curriculum should provide for all children an understanding of the contribution of the Negro, Puerto Rican,

and other minority groups, and the background and nature of the present struggle for justice and equality of opportunity.

11. A broader and more intensive program of workshops for school board members and administrators, sponsored by the State Education Department, designed to promote a fuller understanding of both their local and statewide responsibilities for integration.

12. The provision throughout the State of more extensive and stronger inservice programs for teachers and administrators to increase their understanding and competence in dealing with new situations and requirements of integrated schools.

13. The broadening of the programs in our colleges and universities for the training of teachers and administrators to include preparation for the special requirements of integration. This preparation should include such experiences as student teaching, internships, seminars, and workshops involving minority-group children and adults.

CONCLUSION

Fundamental in all efforts to achieve the objective of an integrated society is the principle of equality of educational opportunity. A manifestation of the vitality of our American democratic society and essential to its continuation, this basic principle, deeply embedded in education law and policy, has been continually reaffirmed in both its practical advantages and its moral justice by new developments and needs of changing times.

The Regents reaffirm their dedication to this principle and reemphasize the obligation of the entire educational system to maintain those policies and practices that will make equality of educational opportunity a reality for all our children and youth.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

Position Papers	
No. 1 Urban Education	November 1967
No. 2 Prekindergarten Education	December 1967
No. 3 Integration and the Schools	January 1968

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

INTEGRATION
and the
SCHOOLS

A Restatement of Policy
by the
REGENTS OF THE
UNIVERSITY OF THE
STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT
Albany
December 1969

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

THE UNIVERSITY OF THE STATE OF NEW YORK

Regents of the University *(with years when terms expire)*

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1978	ALEXANDER J. ALLAN, JR., LL.D., Litt.D.	Troy
1973	CHARLES W. MILLARD, JR., A.B., LL.D., L.H.D.	Buffalo
1972	CARL H. PFORZHEIMER, JR., A.B., M.B.A., D.C.S., H.H.D.	Purchase
1975	EDWARD M. M. WARBURG, B.S., L.H.D.	New York
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1974	JOSEPH C. INDELICATO, M.D.	Brooklyn
1976	MRS. HELEN B. POWER, A.B., Litt.D., L.H.D.	Rochester
1979	FRANCIS W. MCGINLEY, B.S., LL.B., LL.D.	Glens Falls
1980	MAX J. RUBIN, LL.B., L.H.D.	New York
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1982	STEPHEN K. BAILEY, A.B., B.A., M.A., Ph.D., LL.D.	Syracuse
1983	HAROLD E. NEWCOMB, B.A.	Owego
1981	THEODORE M. BLACK, A.B.	Sands Point

President of the University and Commissioner of Education
EWALD B. NYQUIST

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

INTEGRATION AND THE SCHOOLS

A RESTATEMENT OF REGENTS POLICY

POLICY

Events and trends since January 1968, when our statement entitled *Integration and the Schools* was released, lead us to believe that we should again address ourselves to this critical issue. We have carefully reviewed experience in the last year and a half, and at this time comment on this experience and restate our beliefs.

We are convinced that the elimination of racial segregation in the schools can enhance the academic achievement of non-white children while maintaining achievement of white children and can effect positive changes in interracial understanding for all children. The latter consideration is paramount. If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society. The stability of our social order depends, in large measure, on the understanding and respect which is derived from a common educational experience among diverse racial, social, and economic groups — integrated education. The attainment of integrated education is dependent upon the elimination of racial segregation in the schools.

The elimination of racially segregated education is also national policy. The Supreme Court of the United States recently has ruled, in the case of *Alexander* vs. *Holmes County Board of Education,* that the segregated schools in Mississippi must be eliminated at once, and that there must be a " totally unitary school system for all eligible pupils without regard to race or color." While the decision relates to *de jure* segregation, it affirms the basic philosophy of the Court on the elimination of segregation.

The efforts of the State of New York to eliminate segregation and to speed integration must be increased. We pledge our efforts and those of the State Education Department to greater vigilance in this area.

COMMENT ON CHAPTER 342, LAWS OF 1969

We are concerned that implementation of State policy to provide equal educational opportunity for all, and, as a means to that end, to eliminate racial segregation is impeded by legislation enacted in

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

1969. This legislation prohibits appointed school boards and the New York State Commissioner of Education from directing assignment of pupils and altering school boundaries or attendance zones for the purpose of eliminating racial segregation in the public schools.

We believe that Chapter 342 is an unsound measure for the following reasons:

- The Act denies to appointed boards of education powers held by elected boards. No compelling basis for such a distinction is apparent; and
- The Act denies the State the power, through the State Commissioner of Education, to execute the State's ultimate responsibility for providing equal educational opportunity through the elimination of racial segregation where a school district fails or refuses to act. Issues of racial segregation in the schools should not be separated from other educational issues which may be brought before the Commissioner for determination. In hearing and determining appeals on educational issues, the Commissioner is acting in a judicial capacity assigned to him by the Legislature. This is predicated upon the belief that controversies involving the educational system of the State can best be resolved by the State's chief school officer. The removal of the Commissioner's jurisdiction in the area of desegregation is unsound because it forces any person who seeks redress against violation of his rights in this area to institute action in the courts which have expressly stated their belief that such educational issues may better be resolved by the Commissioner of Education. As in the case of the Commissioner's decisions in other areas, judicial review is available to a party who claims the determination is arbitrary or capricious.

In the light of the reasons just stated, we urge that restoration of the powers of appointed boards of education and the Commissioner to eliminate racial segregation in the schools be given serious consideration.

REVIEW OF RESEARCH

The State Education Department is today releasing a report summarizing research and action related to desegregation and integration. We initiated this review in order to test whether our policy was right and to be assured that we were fulfilling our obligation to provide equality of educational opportunity throughout the State. We reviewed the results of actions taken by the Commissioner of Education and by boards of education in the State, the history of national and State desegregation efforts, trends in the racial composition of the schools in the State, nationally representative studies and more than

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50 local studies bearing upon racial integration in the schools, and the effects that schools have had in mitigating the consequences of social class and ethnic differences. The principal findings are summarized below:

1. The results of current research clearly indicate that schools isolated on the basis of race may be decidedly harmful to the academic achievement of their students. The evidence indicates that the negative effects of segregated schooling are not a result of racial isolation alone but are a consequence of the dominant social and economic environment of the school and classroom. The problem of racial isolation is a part of the broader problem of social class isolation. Negroes and certain other minority group members are proportionately more disadvantaged because of the close correlation between race and economic status and the continuing and exacerbating influence of residential and school segregation. However, any student — whether he be Negro, Puerto Rican, white, or a member of any other identifiable group — is likely to suffer some degree of underachievement as a result of attendance in schools and classrooms with predominantly lower social and economic status children. (" Social and economic status " is hereafter referred to as " status." Lower or upper " status " is measured by relative levels of occupation, income, and education.)

2. The studies of more than 50 school integration programs generally substantiate the positive effects of integration reported in the more representative national or regional studies of the issue. Furthermore, these studies show that a wide variety of integration efforts involving transfer programs within the urban setting or busing from urban to suburban areas generally facilitated the educational development of Negro students while white students continued to make the usual achievement gains. The evidence further indicates that integration is more effective in promoting educational development among Negro students than is compensatory education in segregated school settings.

3. The transfer of lower-status students to schools with predominantly upper-status students is most likely to help their education if: (a) transfer occurs continuously beginning in the earliest elementary grades, (b) the proportion of lower-status students in the school is below 30 percent, and (c) the association of lower- and upper-status students occurs within classrooms as well as in the entire school.

4. When lower-status students are transferred to schools with predominantly upper-status students, the evidence suggests that continued residence in a lower-status neighborhood will not interfere

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with the achievement gain that is to be expected as a result of attendance in the school with predominantly upper-status students.

5. The findings of national and local studies generally indicate that the integrated school setting has substantial potential for improving interracial understanding among Negro and white students. The development of interracial friendships (made more possible in the integrated school setting) appears to be an important condition in facilitating educational and psychological development among disadvantaged minority group students.

The review of the research fortifies our conviction that racial segregation in education must be eliminated in order to achieve equality of educational opportunity. The review of other events and trends indicates that the efforts of our State in eliminating racial segregation must be increased. Two items illustrate the point:

- Racial and social class isolation in the public schools has increased substantially during the past two years despite efforts to eliminate it;
- Although most persons of minority groups favor integration, frustration with the lack of progress in integration and distrust of the intent and efforts of the white majority have brought increasing prominence to the voices of racial separatists and have led even some minority group moderates to endorse separatist solutions.

ACTION

The Regents are pledged to the elimination of racial segregation in the schools as stated in our document of 1968, *Integration and the Schools.* We seek increased State funds for projects to correct racial imbalance, to increase compensatory education programs, and to promote the excellence of teaching necessary to realize integrated education; for services to school districts in planning and implementing desegregation projects; for the development of curricula that will enhance interracial understanding and respect; and for effecting school district reorganization to overcome segregation.

We call on those having powers to eliminate discrimination and segregation in areas related to education — housing and employment, in particular — to use their powers. but we note that those in positions of educational leadership must not wait for other social, business, and political forces to remedy the ills. We must take initiative to overcome the lack of understanding and respect which is at the root of those ills.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

Since the stability of our social order depends on the understanding and respect which derive from a common educational experience among diverse racial, social, and economic groups, that is, integrated education, we are concerned that all means be used effectively to realize integrated education. We call upon the Legislature, the Governor, and all the people of the State to make the commitments necessary to attain this goal.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

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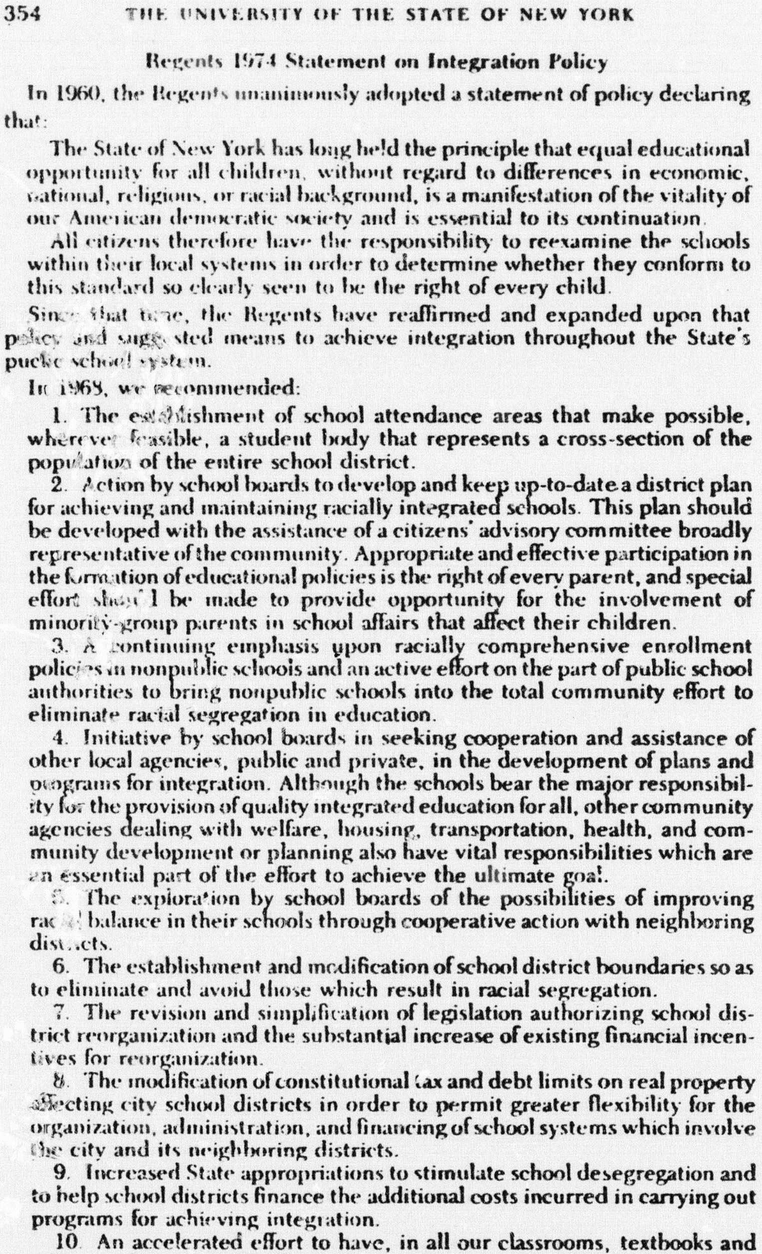

Regents 1974 Statement on Integration Policy

In 1960, the Regents unanimously adopted a statement of policy declaring that:

> The State of New York has long held the principle that equal educational opportunity for all children, without regard to differences in economic, national, religious, or racial background, is a manifestation of the vitality of our American democratic society and is essential to its continuation.
>
> All citizens therefore have the responsibility to reexamine the schools within their local systems in order to determine whether they conform to this standard so clearly seen to be the right of every child.

Since that time, the Regents have reaffirmed and expanded upon that policy and suggested means to achieve integration throughout the State's public school system.

In 1968, we recommended:

1. The establishment of school attendance areas that make possible, wherever feasible, a student body that represents a cross-section of the population of the entire school district.
2. Action by school boards to develop and keep up-to-date a district plan for achieving and maintaining racially integrated schools. This plan should be developed with the assistance of a citizens' advisory committee broadly representative of the community. Appropriate and effective participation in the formation of educational policies is the right of every parent, and special effort should be made to provide opportunity for the involvement of minority-group parents in school affairs that affect their children.
3. A continuing emphasis upon racially comprehensive enrollment policies in nonpublic schools and an active effort on the part of public school authorities to bring nonpublic schools into the total community effort to eliminate racial segregation in education.
4. Initiative by school boards in seeking cooperation and assistance of other local agencies, public and private, in the development of plans and programs for integration. Although the schools bear the major responsibility for the provision of quality integrated education for all, other community agencies dealing with welfare, housing, transportation, health, and community development or planning also have vital responsibilities which are an essential part of the effort to achieve the ultimate goal.
5. The exploration by school boards of the possibilities of improving racial balance in their schools through cooperative action with neighboring districts.
6. The establishment and modification of school district boundaries so as to eliminate and avoid those which result in racial segregation.
7. The revision and simplification of legislation authorizing school district reorganization and the substantial increase of existing financial incentives for reorganization.
8. The modification of constitutional tax and debt limits on real property affecting city school districts in order to permit greater flexibility for the organization, administration, and financing of school systems which involve the city and its neighboring districts.
9. Increased State appropriations to stimulate school desegregation and to help school districts finance the additional costs incurred in carrying out programs for achieving integration.
10. An accelerated effort to have, in all our classrooms, textbooks and other teaching materials that reflect in their content and presentation the ethnic and cultural diversity of our world, and in particular, of American life. The curriculum should provide for all children an understanding of the

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

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contribution of the Negro, Puerto Rican, and other minority groups, and the background and nature of the present struggle for justice and equality of opportunity.

11. A broader and more intensive program of workshops for school board members and administrators, sponsored by the State Education Department, designed to promote a fuller understanding of both their local and statewide responsibilities for integration.

12. The provision throughout the State of more extensive and stronger inservice programs for teachers and administrat[illegible]ease their understanding and competence in dealing with new si[illegible]d requirements of integrated schools.

13. The broadening of the programs in our colleges and universities for the training of teachers and administrators to include preparation for the special requirements of integration. This preparation should include such experiences as student teaching, internships, seminars, and workshops involving minority-group children and adults.

In 1969, we stated:

> The Regents are pledged to the elimination of racial segregation in the schools as stated in our document of 1968, *Integration and the Schools*. We seek increased State funds for projects to correct racial imbalance, to increase compensatory education programs, and to promote the excellence of teaching necessary to realize integrated education; for services to school districts in planning and implementing desegregation projects; for the development of curricula that will enhance interracial understanding and respect; and for effecting school district reorganization to overcome segregation.
>
> We call on those having powers to eliminate discrimination and segregation in areas related to education — housing and employment, in particular — to use their powers, but we note that those in positions of educational leadership must not wait for other social, business, and political forces to remedy the ills. We must take initiative to overcome the lack of understanding and respect which is at the root of those ills.
>
> Since the stability of our social order depends on the understanding and respect which derive from a common educational experience among diverse racial, social, and economic groups, that is, integrated education, we are concerned that all means be used effectively to realize integrated education. We call upon the Legislature, the Governor, and all the people of the State to make the commitments necessary to attain this goal.

In 1972, we stated:

> Eighteen years ago, in the case of *Brown* vs. *the Board of Education of Topeka*, the United States Supreme Court ruled that separate (in the sense of racially segregated) schools were "inherently unequal." Until this ruling is modified or reversed, we believe that all public officials and all citizens are constrained to accept, and to implement as conscientiously as they may by whatever legitimate means are available, the spirit and the letter of the Constitution so interpreted. Anyone may disagree with the Supreme Court's interpretation of the Constitution. But to suggest that a citizen's or an official's disagreement with the Court's decision absolves him from obedience to its mandate is to cut our entire society away from what Walter Lippmann has called, "the hard-won moorings of civilization"; the rule of law.

We reaffirm the principles enunciated in the foregoing statements of policy.

In our 1972 statement we also said:

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

Until residential and occupational integration becomes a reality in this nation . . . the judicious and reasonable use of motor vehicles may be in many instances the only instrument available to enable local communities to meet constitutional requirements and educational goals.

We now state, in this respect, that the judicious and reasonable transportation of pupils, where such transportation is demonstrably necessary to achieve integrated education, may be an appropriate measure for education officials to employ, subject to the considerations hereinafter stated.

Implicit in any integration policy must be the recognition of and respect for other fundamental rights of parents and children. There is particular reason to be concerned over the welfare of children of elementary school age who are assigned to schools which are more than a moderate distance from their homes. Utmost care and consideration shall be exercised by education officials to ensure that the health, the safety, and the educational opportunity of our children will not be compromised in the implementation of the policies we state herein. The child's rights to health, safety, and access to quality education are paramount. We referred to these considerations in 1972, and we now emphasize them.

These are the criteria which shall be applied by all those who have responsibility for education in our State—by local school boards in the implementation of these policies as well as by the Commissioner of Education. Education officials in the State shall provide grievance procedures and, where justified, appropriate remedies to parents who maintain that the rights of their children to health, safety, and access to quality education have been imperiled, contravened, or denied in the course of the assignment of pupils to schools, whether within or outside their neighborhoods.

It is our hope that all sectors of our society, public and private, shall reasonably and effectively pursue the ideals of equal opportunity for all citizens. In striving to achieve these ideals, it is essential that special attention be given to the areas of housing and employment, as well as education.

Chancellor McGovern requested that a roll call vote be taken on the adoption of the *Regents 1974 Integration Policy Statement*.

Those voting for approval were Chancellor McGovern, Vice Chancellor Black and Regents Allan, Pforzheimer, Indelicato, Power, McGinley, Griffith, and Jovanovich.

Those voting in opposition were Regents Clark, Genrich, and Klein.

Regents King and Newcomb were not present at this meeting.

Regent Warburg was absent at the time of the voting but wished to be recorded as associating himself with the majority recommendation.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

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January 22, 1975

Regents Statement on Racial Integration Approved*

Regent Jovanovich moved the adoption of the following statement, which was seconded by Regent Genrich and approved by the board:

At a time when social changes in our society are both rapid and radical, it is important that public officials be sensitive and compassionate in their deliberations and decisions. The Regents are aware that in the matter of racial integration in the public schools of the State of New York there is at issue not only the development of young people but also their immediate and continuing welfare. The social and political ideals that inform American society command us to adhere to the principle that it is desirable for persons of different ethnic origins to conduct their education together. Yet the Regents recognize that we should not, in pursuit of that principle, ignore other rational and legally justifiable views of our citizenry.

The Regents have recently stated their policy on the desirability of the integration of public schools. They here affirm, in support and in addition to that statement of policy, that their view of integration is not based on quantitative measures of school population. Integration does not, by definition, require that racial quotas be used in determining the proper or desirable composition of population within a school. If a school district is making, and has made, a serious effort to bring about equal opportunity for learning amongst its students, including the opportunity for children of various ethnic groups to intermingle and to share a common learning environment, then the Regents maintain that the population of a school within a school district need not be required to be comprised by, or be measured by, ratios or quotas of white to black (or Hispanic) students. The Regents expect that if a school district avails itself seriously and truly of available means to integrate its student population, then it should not be required to establish or maintain particular ratios of students from different ethnic origins. In short, racial integration does not, in the Regents statement of policy, imply quantitative racial balance in all schools within a district.

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*Chancellor McGovern and Regents Allan, Warburg and Clark voted in the negative

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

February 20, 1975

(14)

REGENTS STATEMENT ON RACIAL INTEGRATION OF SCHOOLS

Regent Jovanovich moved the adoption of the following statement, which was seconded by Regent Griffith and approved by the members of the Board:*

Our statement of January 22, 1975 clearly indicates that it is made "in support and in addition to" our statement of policy on October 25, 1974.

We understand that *de jure* segregation is not at issue: it is unconstitutional.

We also understand that busing has become a source of serious argument not alone because some of its opponents may be illiberal, or racist, but also because many responsible people, black and white, do not regard the massive transportation of pupils out of their neighborhoods for purposes of achieving racial balance to be productive in the education of our children.

To determine compliance with Regents policy on integration principally by use of quantitative measures is to use a method which itself offers no assurance that the educational opportunity of each child is protected.

Recourse to quantitative measures is not the sole nor necessarily the principal method for determining and maintaining school integration or for detecting and correcting school segregation. There are other ways to measure whether or not a school district makes serious efforts to bring about integration of schools.

The Regents commit themselves to the following principles:

- The Regents affirm our conviction that equal opportunity for high quality education is the right of every pupil in the public schools of this State, regardless of race, creed, or color.
- The Regents expect every school dist[illegible] to take those steps necessary to enable every pupil to enjoy that primary [illegible]ht, and to provide appropriate appeal procedures for aggrieved pupils [illegible] parents.
- The Regents believe that [illegible]grated schools are essential to assure that primary right to all pupils residing [illegible] racially diverse communities. We define an integrated school as one in which the racial composition of the student body reflects the pupil population of the school district without necessarily attempting to be proportionate to it, and in which the programs, facilities, and equipment are not racially identifiable. What constitutes a reflection of the population of a school district will depend upon the circumstances in specific situations.
- The Regents believe that appropriate means to achieve high quality education for all pupils include, where feasible, strategic location of new schools or closing of unneeded schools or both, optional transfer programs and open enrollment, expansion of magnet and specialized schools, compensatory education programs, curriculums which enhance interracial understanding, recruitment of qualified faculty from varied racial and ethnic backgrounds, equalization of State aid to school districts, alteration of school attendance zones where necessary, and in some instances, the judicious and reasonable transportation of pupils with due consideration that the health, safety, and access to high quality education of pupils are not imperiled and with particular consideration that children of elementary school age are not transported for more than moderate distances.
- The Regents believe that racial integration in public schools does not necessitate uniform proportions of pupils, by race or ethnic background, in all schools in a district. No single factor—whether it be quality of programs, or competence of staff, or adequacy of facilities or racial or ethnic balance—is

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*Regents Clark and Klein voted in the negative and Regent Genrich abstained.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

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alone sufficient to assure that the right of every pupil to high quality education in an integrated school will be realized. The reference to "serious effort" in our statement of January 22, 1975 speaks to a combination of these factors without sole reliance on any one method of integration or on any one measure of judging integration.

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Journal of Regen' · Meeting, March 23-24, 19

REGENTS STATEMENT ON RACIAL INTEGRATION

Regent Bailey moved the adoption by the Board of the following statement:

Recent events and mounting passions on the subject of legitimate means to achieve school desegregation have caused the Regents to review and reaffirm their long-held position on school integration.

That long-held position has been rooted in both constitutional doctrine and educational philosophy.

In regard to the former, this Board is not immune to the jurisdiction of the Supreme Law of this land as determined by our highest court. Eighteen years ago, in the case of *Brown* vs. *the Board of Education of Topeka,* the United States Supreme Court ruled that separate (in the sense of racially segregated) schools were "inherently unequal." Until this ruling is modified or reversed, we believe that all public officials and all citizens are constrained to accept, and to implement as conscientiously as they may by whatever legitimate means are available, the spirit and the letter of the Constitution so interpreted. Anyone may disagree with the Supreme Court's interpretation of the Constitution. But to suggest that a citizen's or an official's disagreement with the Court's decision absolves him from obedience to its mandate is to cut our entire society away from what Walter Lippmann has called, "the hard-won moorings of civilization"; the rule of law.

But even if the issue of school segregation had not received judicial attention, the Regents would take the position that in a multi-racial society, a person cannot be considered educated if he remains unexposed on a personal basis to the cultural richness and the individual diversity of his neighbors. It is just as serious to deny a white child the opportunity to know children of other colors as it is for minority children to be denied contact with whites.

Surely, the generations of this century need no reminder that socially enforced separation of races and classes leads inexorably to stereotyped thinking, and that such stereotypes promote irrational hatreds, mass persecutions, and self-perpetuating social pathologies.

This Board cannot foresee any but the most sullen and corrosive scenarios of the future if the multi-colored and multi-cultured children of this state and nation are not permitted to get to know one another as individuals. To be raised in ignorance of what makes people both similar and different is to invite the predictable penalties of living in an uneducated society.

The issues then come down to matters of competing priorities and alternative means.

On the question of priorities, where there is *substantial* evidence that the means to achieve racial and social integration in schools would involve a serious threat to the health and safety of children, integration plans must of course take these important realities into consideration. Furthermore, where there are *convincing* reasons to believe that the educational achievements of any group of students would be jeopardized by integration plans, such plan must take these facts into account. Surely a rule of reason must apply (as it has applied in this State) in sorting out the worth of competing values of achieving a desirable social end.

But this is not to defend a contrary "rule of unreason." Nor are factors of modest inconvenience, by themselves, adequate justifications for thwarting constitutional and legal doctrine.

Excerpts From Attachment to Letter of June 17, 1976 From David Blasband *et al.* to Judge Curtin.

In this context, the Regents deplore the emotional misapprehensions that have emerged around the issue of "compulsory busing." There are compulsory attendance laws. There are compulsory attendance zones. Busing is frequently a convenience. Patently, in many areas, in a *de facto* sense, busing is a necessity. And in most areas, it has become a great facilitator of educational options and excellence. This is true in spite of the fact that during the past few decades, hundreds of thousands of parents have been temporarily outraged by school-district consolidations involving their children being "forced bused" away from local neighborhoods. Such "forced busing" has been sanctioned by the Legislature and by this Board for decades in order to achieve a higher quality education than was possible in one room "little red school houses." Today most parents are deeply grateful for the diverse and superior educational advantages made possible by the invention of the common-carrier motor vehicle. To say that public authorities may mandate attendance zones as a concomitant to school consolidation, but may not mandate attendance zones to achieve socially and educationally desirable goals of racial and cultural integration, seems to the Regents unsupportable.

Until residential and occupational integration becomes a reality in this nation — the ultimate sign that skin color has lost its evil fetish — the judicious and reasonable use of motor vehicles may be in many instances the only instrument available to enable local communities to meet constitutional requirements and educational goals. Within this context of competing and, at times, overriding considerations of health, safety, and academic quality, neither states nor localities should be prohibited from using buses to achieve desirable social and educational objectives.

Racial, religious, and cultural prejudice has been deeply rooted in our society. Our nobility as a people, however, has been reflected in our conscious effort to overcome these psychic serpents. And as Shakespeare noted in another metaphor and context, "So dark a cloud will not pass without a storm."

But we must not falter now. Using the rule of reason and compassion in the application of supreme law and civic morality, we must press forward with all deliberate speed to achieve the Constitutional mandate to be just, the religious mandate to reverence one another, and the educational mandate to understand the conditions of freedom for all.

Affidavit of Willard A. Genrich in Support of Motion for Reconsideration and Modification of Orders Dated April 30, 1976.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
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GEORGE ARTHUR, et al.,

Plaintiffs, Civ-1972-325

-against- AFFIDAVIT

EWALD F. NYQUIST, et al.,

Defendants.
-----------------------------x

WILLARD A. GENRICH, being duly sworn, deposes and says:

1. I am a member of the Board of Regents of the University of the State of New York, and one of the moving defendants herein. I submit this affidavit in support of the instant motion for reconsideration and modification of the two orders of this Court dated April 30, 1976.

2. In its decision of April 30, 1976 on the substantive issues, the Court determined that I and members of the Board of Regents, acting in our official capacities, have committed omissions constituting intentional acts of segregation in violation of the United States Constitution. At the time of the trial of this matter, I was not named as an individual defendant nor did I have any thought that the decision in this case might have the personal implications which ultimately resulted from this Court's opinion. I was not represented by counsel.

3. Had I known prior to trial that the allegations of the complaint would later be deemed to refer to me specifically and had I been aware that there was a risk that the Court's decision would brand me as participating in intentional acts of segregation, I would have obtained counsel and fully participated in the trial to defend my integrity and reputation.

4. I respectfully submit that had I and other individual Regents participated in this trial, given testimony and been permitted through counsel to cross examine witnesses, the Court would have been apprised of actions and events

which would have negated the conclusion that I and the other members of the Board of Regents were guilty of intentional acts of segregation. I set forth the following examples of my personal involvement in this matter.

A. My term as Regent from the 8th Judicial District began on April 1, 1973. One of my first acts was to attend a meeting of the Buffalo School Board, which was also attended by Deputy Commissioner Thomas Sheldon. At that meeting, Dr. Sheldon requested the school board to formulate a plan for the integration of the Buffalo school system. At that meeting, the then-appointed Board refused to discuss the matter.

B. It was my belief that the Board should at least discuss the matter with Dr. Sheldon. On my initiative, I arranged for an unofficial meeting between the school board and Dr. Sheldon, which as I recall, was held on October 15, 1973. Although issues were discussed at that meeting, which I attended, nothing of substance was accomplished.

C. I arranged for another meeting between the school board and Dr. Sheldon which, I believe, was held in February 1974. This was also unsuccessful.

D. After a new school board was elected, I again attempted to obtain movement toward the adoption of an integration plan. I arranged for a formal meeting between Dr. Sheldon and the Board of Education which was held on January 14, 1976. At that meeting, I reminded the Board of Education of the Regents policy on integration and urged that they move forward and formulate an integration plan. I stressed the importance of eliminating any violations of constitutional rights within the Buffalo school system. Shortly after the meeting, I forwarded to each member of the Buffalo School Board a copy of the Regents' policy statement on integration. I believe that my efforts were, at least, in part responsible to bring about the plan which was ultimately submitted by the Buffalo School Board to this Court.

Affidavit of Willard A. Genrich in Support of Motion for Reconsideration and Modification of Orders Dated April 30, 1976.

5. I must stress that whatever steps I took to convince the Buffalo Board of Education to adopt a plan to integrate the Buffalo school system was the furthest step that I could take as a Regent, as I understand §§207 and 310 of the State Education Law. The Regents simply do not have the power to overrule or question the Commissioner in matters involving his quasi-judicial powers.

6. I have read the transcript of the testimony of Regent Clarke in this case in which he stated that the majority of my colleagues on the Board of Regents voted to ask the Commissioner to withold any attempt at enforcement of existing orders and to refuse to grant any further orders until such time as the committee that was appointed to reexamine the Regents policy statement reported.

7. With due deference to my colleague, Dr. Clarke's statement is in error. We never voted to request nor order the Commissioner to withhold enforcement of any of his integration orders.

Willard A. Genrich
Willard A. Genrich

Sworn to before me this
16th day of August, 1976.

Florence H. Mazur

FLORENCE H. MAZUR
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

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Proceedings Before Hon. John T. Curtin, July 9, 1976.

Proceedings held before the HON. JOHN T. CURTIN, United States District Judge, Western District of New York, in Part I, United States Court House, Buffalo, New York, on July 9, 1976.

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to seek the assistance of members of the business community.

Seventeen. All the parties are directed to begin the work of obtaining suitable community representatives from each school to assist in the monitoring of the plan as finally submitted.

Eighteen. In addition to the obligations already imposed on the State defendants, they are directed to come forth on October 15 with a detailed scheme of involving the suburban schools in the participation with the plan. In the intervening period, the Commissioner and his representatives are directed to meet with suburban school leaders to determine what school resources, staff, BOCES use or other school facilities may be used on a voluntary or other basis in order to assist in the integration effort in the Buffalo Schools. The Commissioner is to report on these meetings in detail to the Court, including information on minority enrollment in each suburban school district, the availability of classroom spaces, and the cooperative use of facilities by the Buffalo Public School System. In particular, the Commissioner shall discuss with the neighboring School Boards and the Superintendents the provisions of Title 20 of the United States Code, Section 1605.

Nineteen. The Board and State defendants are directed to meet with representatives of the other colleges and universities in the area to endeavor to formulate a plan for their participation in the integration program. The community should be grateful to Canisius College for its welcome offer of assistance in the School 17 program. It appears to the Court that the resources of the State University, State Teachers College and other colleges and universities in the area should be solicited and the Court believes that many of these institutions will be ready and willing to offer their space, time and resources, both personnel and physical, to this problem of education. The Court directs the parties to solicit the time and advice of community leaders, business, labor, professional, Bar Association, in this serious and difficult problem. The results of these meetings shall be incorporated into the plan.

Twenty. Because of the modifications of the Buffalo Plan directed in this order, it may be necessary for the Board to adjust some of its plans for the coming school year. The parties shall meet and discuss the difficulties and prepare a joint order to be submitted to the Court for signature on August 17. As far as possible, the problems of the individual student must be addressed. Mere transfer for transfer sake alone does not help the student or the integration of the schools. If it appears apparent that the transfer will be for a one year period only and not in keeping with an overall plan of integration, then if possible, the transfer should be avoided.

Twenty-one. The Court notes that the members of the Common Council are defendants in this suit and have a responsibility to remedy the prior discrimination found by the Court. That body along with other

Decision and Order Dated December 10, 1976 Denying State Defendant Motion to Reconsider.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, et al.

Plaintiffs

-vs- Civ-1972-325

EWALD P. NYQUIST, et al.

Defendants

APPEARANCES: RICHARD F. GRIFFIN, ESQ.
Buffalo, New York, for Plaintiffs.

LOUIS J. LEFKOWITZ, ESQ., Attorney General, State of New York (JEAN M. COON, ESQ., of Counsel), Albany, New York, for defendants Commissioner of Education and Board of Regents of the State of New York.

LINDEN AND DEUTSCH (DAVID BLASBEND, ESQ., of Counsel), New York, New York, for defendant Individual Members of Board of Regents, Martin C. Barell, Willard A. Genrich, Emlyn I. Griffith, Joseph C. Indelicato, William Jovanovich, Mary Alice Kendall, Genevieve S. Klein & Louis E. Yavner.

On April 30, 1976 this court found that the public schools in Buffalo had been purposely segregated in violation of plaintiffs' fourteenth amendment rights. Arthur v. Nyquist, 415 F.Supp. 904 (W.D.N.Y. 1976). Also filed that day was a decision allowing the plaintiffs in this case to amend their complaint to add the individual members of the State Board of Regents and the individual members of the Board of Education, in their official capacities, as parties-defendant.[1] 415 F.Supp., at 972.

Eight individual Regents represented by private counsel filed notice of appeal on June 1, 1976 from that part of this court's decision that found the Regents to have violated plaintiff's fourteenth amendment rights and which enjoined them from further such violation, and from that part of the decision that granted plaintiffs' motion to add these individual Regents in their official capacities as parties-defendant.

On June 16, 1976 these same eight Regents asked this court to modify its April 30, 1976 decision to hold that no individual Regent, or the Board itself, was responsible in any manner for the segregation that characterizes the BPSS, to find that the individual Regents should not have been added as parties-defendant, and to dismiss the action as to those eight individual Regents.

Decision and Order Dated December 10, 1976 Denying State Defendant Motion to Reconsider.

Because these defendants had filed a notice of appeal, this court was without jurisdiction to consider their motion. Then these Regents stipulated to remand the case for this court's consideration of this motion. In open court on August 17, 1976, the court heard the motion and denied it. This memorandum decision contains the court's reasons for the denial of the defendants' motions.

In granting the plaintiffs' motion to add the individual Regents in their official capacities, this court briefly examined the history of 42 U.S.C. §1983 and the limited subject matter jurisdiction under that statute. Although many suits were apparently brought against school boards per se, _see_ _Swann v. Charlotte-Mecklenburg Board of Education_, 402 U.S. 1 (1971)[_see also_ the district court decision at 243 F.Supp. 667 (W.D.N.C. 1965)], and _Cleveland Board of Education v. LaFleur_, 414 U.S. 632 (1974), the Supreme Court in _City of Kenosha v. Bruno_, 412 U.S. 507 (1973), and the Second Circuit in _Monell v. Department of Social Services of the City of New York_, 532 F.2d 259 (2d Cir. 1976), have firmly established that a school board is not a person under

§1983. See also Kornit v. Board of Education, ____ F.2d ____, Docket No. 75-7540 (2d Cir. Sept. 15, 1976).

Notwithstanding this strict construction of §1983's subject matter jurisdiction requirements, when a plaintiff performs the requisite procedural formalities and sues the individual members of a school board, the suit then proceeds as if it were against the board as an entity. This makes logical and practical sense because the board only acts as a body. Furthermore, as this court has pointed out before, if only the actions of individual board members could be considered, and individuals held liable for them, corporate entities such as a school board could continually escape liability by changing their membership.

The court considered all the circumstances when it allowed plaintiffs to add the individual Regents in their official capacities. The Regents were ably represented from the beginning of this lawsuit; they first raised the Kenosha defense in their post trial briefs; and the individual Regents had full notice of the action. It seemed to the court at the time, and it still seems, that it would have been an injustice to dismiss the case against the Board of Regents and to refuse to allow the plaintiffs to amend their complaint to add the individual Regents in their official capacities only.

The Regents also contend that the court erred in finding them jointly liable with the City defendants and the Commissioner of Education for the segregation that permeates the BPSS. The Regents argue that they only make policy and that it is the Commissioner's duty to enforce the policy. Pointing to a provision of New York law that states:

> . . . [the Commissioner of Education's] decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. New York Education Law §310 (McKinney's 1969).

the Regents contend that they are powerless to overturn or modify any action of Commissioner Nyquist. The Regents annexed to their motion papers an opinion by retired New York State Supreme Court Justice Howard T. Hogan which details the strong enforcement powers of the Commissioner, and the inability of the Regents to officially hear an appeal or modify the Commissioner's actions. In sum, the Regents claim that they did all they could within their defined and limited powers and that they should not be held liable for the segregation in the BPSS.

The Hogan treatise is not persuasive. Justice Hogan was asked by the Regents to prepare this article before this case was decided and it appears that the request was made to facilitate the passage of a new law that would give the Regents some statutory appeal power. Be that as it may, the Regents nowhere discuss the fact that the Commissioner serves at their pleasure. N. Y. Education Law §303 (McKinney's 1969).[2/] Ultimately, they do have control over him, and certainly their policy making power could have been utilized to affect the Buffalo situation.

Finally, noting that only one of these eight Regents was elected prior to the institution of this lawsuit, that four were named prior to trial and that three were named post trial, these eight Regents contend that intent to segregate cannot be imputed to officials elected subsequent to the acts or omissions alleged. Mayor of

Philadelphia v. Educational Equality League, 415 U.S. 605 (1974). In that case, the plaintiffs argued that the Mayor of Philadelphia had discriminated in his discretionary appointments to a particular citizens board. The Supreme Court reversed the Court of Appeals decision which upheld the plaintiff's argument. The Court stated that the appellate court "erred in ordering prospective injunctive relief against the new Mayor in a case devoted exclusively to the personal appointment policies of his predecessor." 415 U.S. at 613 (emphasis added). In the course of the opinion, the Court noted:

> Where there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor.
> 415 U.S. at 622.

For this proposition, the Court cited Spomer v. Littleton, 414 U.S. 514 (1974), a case in which the plaintiff sought injunctive relief against a state's attorney. The defendant in Spomer was later replaced by the voters and his successor argued that the case should be dismissed against him. The Supreme Court stated:

> The wrongful conduct charged in the complaint is personal to [the original State's Attorney], despite the fact that he was also sued in his then capacity as State's Attorney. No charge is made in the complaint that the policy of the office of State's Attorney is to follow the intentional practices alleged . . .. 414 U.S. at 521 (emphasis added, footnote omitted).

The Court remanded the case for a determination whether the plaintiff wanted to, and whether he should be allowed to, amend the complaint, since the new State's Attorney was never charged with any misconduct by the plaintiff.[3/]

Neither of these cases stand for the proposition that the defendants claim. In this case, despite the procedural formalities that require that individual members of the Board be sued, we are dealing nonetheless with an entity and that entity's continuing actions and failures to act. In Mayor and Spomer, on the contrary, the Court was dealing with specific acts personal to specific individuals. In one case it was a mayor, in the other it was a state's attorney. Neither case involved a corporate body's actions.

Decision and Order Dated December 10, 1976 Denying State Defendant Motion to Reconsider.

For the reasons stated, the court denies the defendant Regents' motions.

After the eight individual Regents brought this motion, the Attorney General moved on behalf of the remaining Regents and the Commissioner of Education to join in this motion. For the reasons stated above, their motion is also denied.

So ordered.

John T Curtin

JOHN T. CURTIN
United States District Judge

DATED: December 10, 1976

Decision and Order Dated December 10, 1976 Denying State Defendant Motion to Reconsider.

FOOTNOTES

1/

The April 30 decision spoke of adding the individual members of the Board of Education and the Board of Regents in their individual and official capacities. The court clarified its April 30 ruling on June 10, 1976, when it specifically stated that these Board members were added in their official capacities only.

2/

That the Regents possess ultimate control over the Commissioner is demonstrated by the recent firing of Commissioner Nyquist, effective June 1977. See N. Y. Times, Nov. 20, 1976, at 1, col. 1.

3/

The former State's Attorney was one of several defendants in the original complaint. The district court dismissed that part of the complaint requesting injunctive relief against him, but the Court of Appeals reversed. After the appellate court ruling, Spomer was elected the new State's Attorney. Spomer, relying on Supreme Court Rule 48(3), which is based on Federal Rule of Civil Procedure 25(d), and which automatically substitutes a succeeding official in his official capacity in proceedings pending when he takes office, petitioned the Supreme Court for review of the appellate decision. Spomer v. Littleton, supra, 414 U.S. at 520-521.

Order of Judge Curtin Rebriefing Austin.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, et al.

Plaintiffs

-vs- Civ-1972-325

EWALD P. NYQUIST, et al.

Defendants

The court is aware that the recent Supreme Court comments and action in the Austin, Texas school case, Austin Independent School District v. United States, 45 U.S.L.W. 3413 (Dec. 12, 1976), in which the Court vacated the circuit court's order and remanded the case for further consideration in light of Washington v. Davis, 426 U.S. 229 (1976), have provoked some discussion.

At this point, the impact of the Supreme Court's actions are unclear. Since every city is unique and the factual foundation of that case is different in many respects from this case, further study must be made to discover what effect will be felt on the Buffalo school case.

Order of Judge Curtin Rebriefing Austin.

For the present, then, the parties are directed to follow the previous orders and guidelines of this court and the deadlines that have been set.

In order to assist the court, all parties are requested to analyze and brief the Austin case, and Washington v. Davis, supra, as these cases pertain to this case. For the convenience of the parties, a copy of Justice Powell's comments in the Austin case, as they are reported in the December 12, 1976 issue of United States Law Week, will be sent to each party with this order. The court directs that briefs be submitted on or before January 19, 1977.

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: December 14, 1976

Motion to Vacate or in the Alternative to Reconsider This Court's "Decision and Order" of April 30, 1976.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, ET AL., Plaintiffs, v. EWALD P. NYQUIST, ET AL., Defendants.	CIV-1972-325 MOTION TO VACATE OR IN THE ALTERNATIVE TO RECONSIDER THIS COURT'S "DECISION AND ORDER" OF APRIL 30, 1976.

SIRS:

PLEASE TAKE NOTICE, that on January 14, 1977, at 10:00 o'clock in the forenoon, in the United States Courthouse, defendants EUGENE REVILLE, STANLEY MAKOWSKI, THE MEMBERS OF THE BOARD OF EDUCATION and THE MEMBERS OF THE COMMON COUNCIL, upon the annexed affidavit of ANTHONY GREGORY, ESQ., sworn to ~~December~~ January 7 30, 1977, will move this Court for an order vacating this Court's "Decision and Order" of April 30, 1976, or, in the alternative, to reconsider its "Decision and Order" of April 30, 1976.

Dated: Buffalo, New York
December 29, 1976

Yours, etc.

LESLIE G. FOSCHIO
Corporation Counsel
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Motion to Vacate or in the Alternative to Reconsider This Court's "Decision and Order" of April 30, 1976.

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Affidavit of Anthony Gregory in Support of Motion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, et al.,

Plaintiffs,

-vs-

EWALD P. NYQUIST, et al.,

Defendants.

SUPPORTING AFFIDAVIT

STATE OF NEW YORK:
COUNTY OF ERIE :   SS.:
CITY OF BUFFALO :

ANTHONY GREGORY, being duly sworn, deposes and says:

1. That he is an Assistant Corporation Counsel and, as such, the attorney for the moving defendants herein.

2. That he is familiar with all of the facts and proceedings of this case from beginning to the present.

3. That on April 30, 1976, a "Decision and Order" was made by this Court in which the Court found that all of the defendants had engaged in acts of "de jure" segregation, which resulted in an unlawfully segregated school system.

4. That in reaching this conclusion, this Court relied upon the prior decision of the U.S. Supreme Court and other Federal Courts including a decision of the Second Circuit.

5. The standard for determining liability established by the Second Circuit in Hart is a standard stricter than that set forth by the United States Supreme Court in Keyes.

6. In June of 1976, the United States Supreme Court decided the case of Washington v. Davis.

7. In October of 1976, the Supre Court, in reviewing a desegregation case arising in Austin, Texas, vacated the judgment of the Fifth Circuit and remanded the matter back to the Circuit Court for reconsideration in light of Washington v. Davis.

8. That, consistent with the command of the Supreme Court to the Fifth Circuit to review its decision in the Austin case, this Court now has no less a duty than does the Fifth Circuit to review its decision in this matter, giving due regard to Washington v. Davis.

9. That the Board of Education has gone forward, as evidence of its good faith, and prepared a plan for the further desegregation of the schools in the City of Buffalo.

10. That this plan will be presented to the Court on January 5, 1977.

Affidavit of Anthony Gregory in Support of Motion.

11. That this plan will be implemented in September of 1977, because of its educational soundness and benefits to the children of the district and its implementation will not be made dependent upon the outcome of this motion or any further proceedings hereinafter held.

12. That whatever delay this motion occasions, it will not result in irreparable harm to plaintiffs and, in fact, will bring benefits to the class represented by the plaintiffs.

WHEREFORE, the defendants respectfully pray that this Court vacate its "Decision and Order" of April 30, 1976, and perform that function required of the Fifth Circuit by the United States Supreme Court in Austin, i.e., "for reconsideration" in light of Washington v. Davis, or in the alternative without actually vacating the "Decision and Order", to nevertheless, perform the function of reconsideration.

Anthony Gregory /S/
ANTHONY GREGORY

Sworn to before me this
29th day of December, 1976.

Commissioner of Deeds - Buffalo, New York
My Commission Expires 12/31/76.

Decision and Order Dated March 1, 1977.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, et al.

Plaintiffs

-vs- Civ-1972-325

EWALD P. NYQUIST, et al.

Defendants

DECISION
and
ORDER

CURTIN, District Judge

Decision and Order Dated March 1, 1977.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, et al.

Plaintiffs

-vs- Civ-1972-325

EWALD P. NYQUIST, et al.

Defendants

APPEARANCES: RICHARD F. GRIFFIN, ESQ., Buffalo, New York, and HERMAN SCHWARTZ, ESQ., Amherst, New York, for Plaintiffs.

LOUIS J. LEFKOWITZ, ESQ., Attorney General of the State of New York (RUTH KESSLER TOCH, ESQ., Solicitor General, & JEAN M. COON, ESQ., Assistant Solicitor General, of Counsel), Albany, New York, and (EUGENE A. PANFIL, ESQ., Assistant Attorney General, Buffalo, New York, of Counsel), for the Commissioner of Education and the Board of Regents of the State of New York, defendants.

LINDEN AND DEUTSCH (DAVID BLASBAND, ESQ., of Counsel), New York, New York, for Individual Regents Barell, Indelicato, Genrich, Griffith, Klein, Jovanovich, Kendall & Yavner, defendants.

LESLIE G. FOSCHIO, ESQ., Corporation Counsel of the City of Buffalo (ANTHONY GREGORY, ESQ., Assistant Corporation Counsel, and AUBREY McCUTCHEON, ESQ., Special Counsel, of Counsel), Buffalo, New York, for Mayor Stanley M. Makowski, Superintendent of Schools Eugene T. Reville, The Board of Education, and the Common Council of the City of Buffalo, defendants.

Decision and Order Dated March 1, 1977.

In December 1976, after the Supreme Court vacated and remanded the Austin school case, Austin Independent School District v. United States, ____ U.S. ____, 45 U.S.L.W. 3413 (Dec. 7, 1976), this court requested each of the parties to this school case to brief the Austin case and Washington v. Davis, 426 U.S. 229 (1976), the case that prompted the Supreme Court's action in Austin. Following this court's request, the City defendants by motion asked this court to vacate its April 30, 1976 liability decision, Arthur v. Nyquist, 415 F.Supp. 904 (W.D.N.Y. 1976), or, in the alternative, to reconsider that decision in light of Washington v. Davis and Austin. The court has agreed to reconsider its decision.

The City defendants contend that Washington v. Davis, the Austin case, and the subsequently decided case of Village of Arlington Heights v. Metropolitan Housing Development Corp., ____ U.S. ____, 45 U.S.L.W. 4073 (Jan. 11, 1977), all of which are post-April 30, 1976 cases, have changed the law this court relied on in its liability decision. The State defendants urge the same argument in their briefs. To determine the impact of these cases requires a close look at each.

I. WASHINGTON v. DAVIS

In Washington v. Davis, 426 U.S. 229 (1976), the plaintiffs alleged that a test administered by the District of Columbia's Police Department to prospective police officers was a violation of their fifth amendment due process rights. The plaintiffs, two black men whose applications had been rejected, did not claim that the department intentionally discriminated against them through the use of the test, but merely charged that the test had "a highly discriminatory impact in screening out black applicants." 348 F.Supp. 15, 16 (D.D.C. 1972). On appeal, the circuit court reversed the district court and held that the disproportionate racial impact alone was sufficient to sustain plaintiff's claim of a constitutional wrong. 512 F.2d 956, 960 (D.C.Cir. 1975).

The Supreme Court's decision in Washington, overruling the circuit court, stated explicitly:

> [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.
> 426 U.S., at 239 (emphasis in original).

During the course of its opinion, the Court noted that school cases have adhered to the principle that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 426 U.S., at 240. The Court cited with approval its 1973 decision in the Denver school case, Keyes v. School District No. 1, 413 U.S. 189, 205 (1973), in which the Court had stated that one of the essential elements of de jure segregation is "a current condition of segregation resulting from intentional state action."

II. AUSTIN

When the Supreme Court vacated the circuit court opinion in the Austin case, it remanded the case to the circuit court "for reconsideration in light of Washington v. Davis." 45 U.S.L.W. 3413 (Dec. 7, 1976). Some light was shed on the Court's thinking by the separate opinion of Justice Powell, concurred in by Chief Justice Burger and Justice Rehnquist, which stated:

> As suggested by this Court's remand premised upon Washington v. Davis, supra, the Court of Appeals may have

> erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified.[1]
>
> [1] Although in an earlier stage in this case other findings were made which evidenced segregative intent, see, e.g., United States v. Texas Education Agency, 467 F.2d 848, 865-869 (CA 5 1972) (actions by school authorities contributing to segregation of Mexican-American students), the opinion below apparently gave controlling effect to the use of neighborhood schools . . ..

The Austin case has a long history. Filed in 1970, the suit alleged that the Austin Independent School District [AISD] discriminated against both black and Mexican-American students. With respect to the latter, however, the district court found that the Government did not prove intentional discrimination. On appeal, the circuit court, in an en banc decision, 467 F.2d 848 (5th Cir. 1972) [Austin I], reversed this finding as clearly erroneous. Among other things, the circuit court stated:

> The district court may have applied an erroneous legal standard . . ..
>
> It is not necessary to prove discriminatory motive, purpose, or intent as a prerequisite to establishing an equal protection violation when discriminatory

effect is present.
467 F.2d, at 864-865, n.25.

The case came back on appeal to the Fifth Circuit after the district court had adopted and put into effect the remedy proposal of the AISD. In the intervening years, the Supreme Court had decided the Keyes case, in which it specifically noted the intent requirement.[1/] The circuit court admitted that the "cause and effect" test previously applied in Austin I, which obviated any need for finding discriminatory intent, was supervened by Keyes. The court proceeded to find the defendants had intentionally discriminated against the plaintiffs. 532 F.2d 380, 390-392 (5th Cir. 1976) [Austin II]. However, it apparently is unclear to the Supreme Court, as evidenced by Justice Powell's words, supra, whether the Fifth Circuit made a proper finding of intent. During the course of his opinion, Judge Wisdom noted that Austin is a residentially segregated city, and that the "natural, foreseeable, and inevitable result of the AISD's student assignment policy," 532 F.2d, at 390, which is to assign a student to the school nearest his or her home, is a segregated school system in Austin. The inference of discriminatory intent, said the court, was inescapable. The reason for utilizing the "reasonable and foreseeable consequences" test is that "it is difficult - and often futile - to obtain direct evidence of [an] official's intentions." 532 F.2d, at 388.

Justice Stevens, in a concurring opinion in Washington v. Davis, supra, has made the same observation:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. . . .
>
> My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of [Washington v. Davis] might assume. 426 U.S., at 253-254.

III. ARLINGTON

In Arlington, a non-profit developer had arranged to buy a tract of land in a suburb of Chicago and build low and moderate income housing. The projected series of town houses, amounting to some 190 units, would occupy a fifteen-acre tract that had been zoned for single-family houses. The developer requested a zoning change to allow his multiple-family project to proceed and he was turned down.

Arlington, in the 1970 census, was recorded as having 64,000 residents of whom twenty-seven were black. The town house development was expected to be integrated, and the developer and several prospective black tenants sued various Arlington officials claiming that the refusal to rezone the land was a violation of their fourteenth amendment rights. After a trial, the district court ruled that the plaintiffs had not proved that defendants' actions were motivated by racial discrimination. Instead, the court found that the village officials acted "to protect property values and the integrity of the Village's zoning plan." 373 F.Supp. 208, 211 (N.D.Ill. 1974). The court noted that this particular parcel had been zoned for single-family use ever since 1959 when the zoning map was first drawn up.

On appeal, however, the circuit court, although it agreed that racial discrimination had not motivated the defendants, reversed because the refusal to rezone the tract had a racially disproportionate effect. 517 F.2d 409 (7th Cir. 1975). The Supreme Court, citing Washington v. Davis, stated that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." Arlington, supra, 45 U.S.L.W. at 4077.

As Justice Stevens did in Washington v. Davis, the Arlington Court went on to discuss at some length the inherent difficulty of imputing intent when the actions of a group of people are concerned.

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. . . . But racial discrimination is not just another competing consideration. . . .
>
> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action . . . may provide an important starting point. Arlington, supra, 45 U.S.L.W. at 4077.

Since the district court had found, and the Court of Appeals had agreed, that no racially discriminatory intent was proved, the Supreme Court reversed the Court of Appeals.

IV. THE INTENT REQUIREMENT

Certainly the impact of Washington v. Davis, Austin, and Arlington is that there may be no finding of racial discrimination in violation of the Constitution without a finding of discriminatory intent. This much is uncontested by the parties. Furthermore, if this were the full import of these cases, no reconsideration of this court's decision would be warranted since the court made findings of the requisite discriminatory intent as to the Board of Education, the Common Council, the Superintendent of Schools, the Board of Regents and the Commissioner of Education. The critical question following these cases, however, and the point on which the defendants claim this court's findings are faulty, is the standard for intent.

Implicit in these recent cases, the defendants' argument goes, is a complete rejection of the "probable and foreseeable consequences" test as a measure of intent.

This test, which has been utilized to varying degrees by a number of courts,[2] including the circuit court in Austin II, supra, was adopted in this circuit in the case of Hart v. Community School Board, 512 F.2d 37 (2d Cir. 1975). Since this court cited and relied on Hart, and since this court made use of this standard in its decision, the defendants argue that the findings of intent were improper.

V. THE HART TEST

In Hart, a school desegregation suit involving only one school, Mark Twain Junior High School in Brooklyn, New York, Judge Weinstein in his district court decision, 383 F.Supp. 699 (E.D.N.Y. 1974), made the somewhat unusual finding that the defendants, although they had, among other things, changed feeder patterns, amended attendance zones and constructed a new junior high school with the "natural and foreseeable impact of . . . helping create severe racial imbalance," nevertheless found that the defendants did not desire Mark Twain to become segregated. 383 F.Supp., at 716, 721. Treating the case as an example of de facto segregation, Judge Weinstein went on to find a constitutional violation because school officials took steps they knew would enhance the segregation and refused to take steps to alleviate it. 383 F.Supp., at 755.

On appeal, the Community School Board urged that the district court had applied the wrong standard and that it could not charge the Board with segregating the school and at the same time declare it innocent of any racially discriminatory intent. The appeals court acknowledged that the district court's findings were "somewhat inconsistent," 512 F.2d, at 48, and disagreed that the evidence showed _de facto_ segregation. The intent required for a finding of _de jure_ segregation, the court ruled, "may be evidenced by the performance of acts, the foreseeable consequence of which is segregation." 512 F.2d, at 51.

The circuit court realized that this standard had not been given official, explicit approval by the Supreme Court, but, citing cases that indicated approval of an objective standard of intent,[3/] it said:

> Unless the Supreme Court speaks to the contrary, we believe that a finding

> of de jure segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation.
> 512 F.2d, at 50.

To the extent that the Hart standard suggested that mere cause and effect, mere analysis by way of a "reasonable and foreseeable consequences" test which amounts to a finding that disproportionate impact is sufficient to impose liability for school segregation under the fourteenth amendment, it is refuted by Washington v. Davis and Arlington.[4/] This apparently is what the Supreme Court thought might have happened in Austin II. But this court does not read either Washington v. Davis or Arlington to prohibit the use of the foreseeable consequences test to analyze circumstantial evidence in evaluating the intent of defendants in school cases. At a minimum, "[t]he impact of the official action - whether it 'bears more heavily on one race than another,' Washington v. Davis, 426 U.S., at 242 - may provide an important starting point." Arlington, supra, 45 U.S.L.W. at 4077.

The Supreme Court has acknowledged repeatedly the necessity, and the difficulty, of inquiring into the motive behind objective acts. See Arlington, supra, 45 U.S.L.W. at 4077-4078; Washington v. Davis, supra, 426 U.S., at 253-254 (J. Stevens, concurring). Washington v. Davis, Austin and Arlington merely emphasize that the motive behind actions and inactions, and not the resultant impact alone, is determinative when a constitutional violation is alleged.

VI. RECONSIDERATION

Having completed this long analysis of what some considered a "semantic" argument before Washington v. Davis and Arlington, see Hart, supra, 512 F.2d, at 51, the court must now reconsider its opinion of April 30, 1976. The question on reconsideration is simply this - did this court find that the defendants intentionally acted and refused to act so as to segregate and maintain the segregated condition of the Buffalo Public School System, or did it find a constitutional violation on the basis of disproportionate racial impact alone, without a finding of racial discriminatory intent.

The April 30, 1976 liability decision is detailed and extensive. The court cited and relied on the leading Supreme Court case of Keyes v. School District No. 1, supra, which requires that plaintiffs prove "purposeful or intentional segregative acts by the defendants." Arthur v. Nyquist, supra, 415 F.Supp., at 912. Following the command of Keyes, this court labored to conduct what the Supreme Court later called "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington, supra, 45 U.S.L.W., at 4077. At the City defendants' request, the court has backtracked and reviewed its findings carefully. It is not necessary now to repeat at length all the evidence of purposeful intent contained in the April 30, 1976 decision, but a brief review should serve to put the findings in perspective. It should be emphasized that by citing here a few examples of the evidence produced at trial, the court is not indicating that the rest of the proof, explained in greater detail in the original decision, is no longer persuasive.

EAST HIGH - The plaintiffs proved at trial that the Board ignored its own curriculum policy, offering a special foreign language at a high school where sufficient student support existed, when it allowed large numbers of foreign language transfers out of East. The great proportion of transferring students were white. The Board was aware of the detrimental racial effect this was having on East, and no reason existed for ignoring or circumventing its own curriculum policy. This evidence, in addition to other proof on redistricting of East's district, was sufficient to find that the Board intended that white students be allowed to avoid East and that East become a black school.

WOODLAWN JUNIOR HIGH - This court found that the plaintiffs failed to prove racial intent in the siting of Woodlawn Junior High School. But when it came to the districting of that school, the question of intent was inescapable. There was overwhelming evidence, including the testimony of Board members, that the Board intended that Woodlawn be a black junior high.

TRANSFERS AND OPTIONAL AREAS - In Arlington, the Supreme Court noted that procedural and substantive departures from the norm are sometimes probative of racial intent. Arlington, supra, 45 U.S.L.W., at 4077. The plaintiffs' proof that some white students were allowed to transfer to avoid black schools for reasons that were inadequate under official Board policy, that others were allowed by individual principals to transfer instead of following normal procedure and applying to the Office of Pupil Personnel Services, and that some white students were able to avoid black schools because some predominantly white areas were made optional areas, are examples of such procedural and substantive irregularities that can support a finding of invidious purpose. The court examined the Board's actions with respect to several elementary schools in particular, and found that the evidence on transfers and optional areas was sufficient to support a finding of discriminatory intent.

VOCATIONAL - TECHNICAL SCHOOLS - The Board admitted that its admissions policies at particular schools were discriminatory, so the question of intent did not arise.

STAFF - The assignment of minority staff and minority administrators to predominantly or all minority schools was admittedly done intentionally.

The finding on staff recruiting stands on different grounds. The plaintiffs' proof on this question consisted essentially of statistics showing that minority staff had not increased perceptibly, in percentage terms, in over ten years time. Standing alone, it is arguable whether this evidence meets the "stark pattern" test of Gomillion v. Lightfoot, 364 U.S. 339 (1960). See Arlington, supra, 45 U.S.L.W., at 4077. But this is not simply a hiring discrimination suit, and the individual parts of a full spectrum school discrimination suit cannot be isolated from each other. See Keyes, supra, 413 U.S.,at 207. The overall evidence of racial discrimination in other areas of the school system, and in particular the admitted assignment of black staff and administrators to predominantly or all minority schools, is sufficient to support a finding that the limitation on minority hiring was purposeful.

COMMON COUNCIL - The Common Council's actions to stop the use of portable classrooms against the express advice of the Corporation Counsel and to hold up the construction of West Hertel Middle School were racially motivated. The Superintendent of the schools at the time believed this, and the evidence at trial allowed only that conclusion.

REGENTS AND COMMISSIONER NYQUIST - This court has already considered one request from the Regents and Commissioner Nyquist to amend its April 30, 1976 decision and find them innocent of any racial discrimination with regard to the B.P.S.S.[5/] The court declined to do so then, and it declines to do so now.

The Regents and the Commissioner, through their action in the early and mid-1960's, put the B.P.S.S. on notice that segregation must be remedied. Barring a lawsuit, if the Board of Education refused to act, only the Regents and the Commissioner could force their hand. Conversely, if the City officials were reluctant to act, as they proved to be, inaction by State officials could only encourage the City to continue its old ways. The Regents and the Commissioner were well aware of this. Nevertheless, alleging that they did not bring about the segregation in the B.P.S.S., the Regents and the Commissioner contend that their encouragement and requests that segregation be ended are sufficient to absolve them of liability. This reasoning is fallacious.

In New York State, as this court has explained before, public education is the province of the State Department of Education, which is governed by the Regents and whose chief administrative officer is the Commissioner of Education. Commissioner Nyquist admitted at trial that only action by the Commissioner or by this court could accomplish desegregation of the B.P.S.S. The Regents must have been aware of this also. Certainly they knew that it was a rare day when a school district voluntarily integrated its schools. 415 F.Supp., at 951, n.48. The Commissioner also testified at trial that the Board of Education's actions "clearly and unequivocally violate the [illegible]ents policy." 415 F.Supp., at 958.

It may be, as the Regents and the Commissioner urge, that when state officials have been completely uninvolved with a school district, they should not be held liable for segregation that exists in that school district. But here, the Regents and the Commissioner asserted their authority over the B.P.S.S. and demanded action. Their subsequent failure, over more than a decade's time, to require compliance with their directives served to continue and exacerbate the racial isolation in the Buffalo public schools. The court could only conclude from the Regents' and the Commissioner's actions over this extended time period that, contrary to the lip service they paid integration, they intended that the situation in Buffalo continue unabated. The Regents' continued reliance on their plethora of policy statements urging an end to school segregation is disingenuous. It hardly needs restating that actions speak louder than words.

HOUSING - The housing evidence presented by the plaintiffs was less extensive than the school evidence proper. Much of it dealt with the actions of non-parties. But the conclusion that the Common Council intentionally caused the minority families to be relocated to minority neighborhoods during the Ellicott District redevelopment is supported by the evidence.

As the court noted in its decision, the housing evidence provided an alternative ground for the court's finding of a constitutional violation. It serves the added purpose of providing a more complete historical perspective to the school situation here, and it punctures the popular conception that all minorities either desire to live apart or are forced to by economic circumstance.

Having found that the defendants were guilty of widespread acts of segregation "affecting a substantial portion of the students, schools, teachers, and facilities within the school system," Keyes v. School District No. 1, supra, 413 U.S., at 201, this court then applied the Keyes standard to find that the B.P.S.S. was segregated.

The foregoing analysis of the case law and of the facts of this case cause this court to reaffirm its April 30, 1976 decision.

The court must now turn to a consideration of the City and State defendants' plans for the September, 1977 school term. The court sets a hearing on the proposed plan for March 14, 1977 at 11:00 a.m. If the schedules of all parties permit, the hearing will continue daily thereafter until completion. At the hearing, the defendants shall have appropriate Board members and staff present to explain the details of the plans submitted and to explain the inability to file more comprehensive plans to integrate the Buffalo schools.

At a prior meeting, the court has already noted some questions concerning the proposed plans, and the plaintiffs have noted certain objections to the proposals. Furthermore, the hearing last June on the initial plans involved a wide range of problems and indicated the parameters within which the defendants must work. At the hearing, the defendants must be prepared to address themselves to these problems.

Each party is requested to inform the court by March 9, 1977 of the witnesses it expects to call and the estimated length of direct testimony. Any scheduling problems should be called to the court's attention immediately.

So ordered.

John T Curtin
JOHN T. CURTIN
United States District Judge

DATED: March 1, 1977

FOOTNOTES

1/

The "cause and effect" language appears to have originated in *Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972), a school desegregation case in which the court, after announcing: "we discard the anodyne dichotomy of classical de facto and de jure segregation," set up the following test:

> We need only find a real and significant relationship, in terms of cause and effect, between state action and the denial of educational opportunity occasioned by the racial and ethnic separation of public school students. 467 F.2d, at 148.

2/

For a list of cases that have considered the use of this standard, *see* *Austin* II, *supra*, 532 F.2d, at 389, n.6.

3/

The *Hart* court, as well as the *Austin* I and II and *Cisneros* courts relied in part on *Palmer v. Thompson*, 403 U.S. 217 (1971), and *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972). *See* 512 F.2d, at 47-51; 467 F.2d at 150-151, 864-865; 532 F.2d, at 388. The Supreme Court admitted in *Washington v. Davis*, *supra*, that the *Palmer* and *Wright* cases were susceptible to this interpretation. 426 U.S., at 242-244.

4/

The defendants point particularly to the following passage in the court's decision:

> In deciding the question of intent, the court is not required to find guilt

> or innocence, prejudice or evenhandedness, or even "badness" or "goodness" on the part of the defendants. To prove their case, plaintiffs are not required to show that racist motives prompted the defendants, nor even that defendants wanted the schools to be segregated, although proof of either of these would be sufficient to show the required intent. It is enough, as the Second Circuit explained in Hart v. Community School Board, 383 F.Supp. 699 (E.D.N.Y. 1974), aff'd 512 F.2d 37 (2d Cir. 1975), to show that the probable and foreseeable result of the defendants' acts was segregation. 415 F.Supp., at 912-913.

To the extent that this misstates the law on intent after Washington v. Davis and Arlington, supra, the court stands corrected. However, the court believes that although it may have overstated the law in this particular paragraph, the findings on intent, which the court reviews, infra, are based on a more narrow standard.

5/

The court's written opinion was dated December 10, 1976.